In the Supreme Court of the United States.

No. 1,525.

THE CITY OF NEW ORLEANS AND JOSEPH A. SHAKESPEARE, MAYOR,

Plaintiffs in Error,

versus

THE NEW ORLEANS WATER WORKS COMPANY, ET AL.

Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief on Motion to Dismiss or Affirm.

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STATEMENT OF FACTS AND OF THE PLEADINGS.

In 1877 the Legislature of Louisiana passed Act No. 33 of the extra session of that year, which act is printed as appendix "A." The New Orleans Water Works Company was, under the provisions of Act 33, incorporated for the purpose of furnishing a water supply to the City of New Orleans and the citizens thereof. Aside from this great privilege, other advantages were bestowed by the Act, and these include the monopoly of the privilege for the term of fifty years.

By Section 9 of the Act in question, it was provided that the supply of water to the City of New Orleans should be

free, and in consideration thereof, that the franchises and property of the Company should be exempt from taxation —State, municipal and parochial.

In the following year the Charter was amended by the Legislature, by striking therefrom the exemption from State taxation.

The Constitution of Louisiana of 1868 required that taxation should be equal and uniform. Under the well established jurisprudence of Louisiana, the General Assembly was prohibited from exempting property from taxation —State, parochial or municipal.

City of New Orleans vs. Bank of Lafayette, 27 An. 376.

Same vs. People's Bank, Ib. 646.

Same vs. St. Charles Street Railroad Company, 28 An. 497.

Same vs. St. Patricks Hall, Ib. 512.

Same vs. Bank of Lafayette, Ib. 756.

Disregarding the exemption, but acting in conformity with law, the City of New Orleans proceeded to assess the property of the New Orleans Water Works Company, and, in consequence, instituted suit for the collection of municipal taxes for the year 1881. The Company thereupon defended, and set up the plea of exemption under Section 11 of their Charter, Act 33 of 1877, already cited, and prayed the Court, in the event that the plea should not prevail, for judgment in reconvention against the City, for the value of the water unto it furnished as upon a *quantum meruit*. There was final judgment on appeal in favor of the City for the amount of taxes by it claimed for the year 1881, and in favor of the New Orleans Water Works Company, on the reconventional demand, for an exactly similar amount for the water supply furnished by it to the City during that year. The Supreme Court of Louisiana, in arriving at this conclusion, considered Section 11 of Act 33 of the Acts of 1877, and gave it force and effect, although the Court did not coincide with the Water Works Company in its view thereof. Section 11 was not annulled, but it was equitably interpreted and

applied by the Court. The judgment of the Supreme Court of Louisiana became final, and the Water Works Company acquiesced therein.

The fact of acquiescence does not appear in the Record in the present suit, but does in Record No. 73 of the October term of 1889 on the docket of this Court, in the suit entitled: New Orleans Water Works Company, Plaintiffs in Error, vs. The City of New Orleans, Defendant in Error, wherein the plaintiffs in error moved to discontinue the appeal taken by them from the judgment in favor of the City of New Orleans by the Supreme Court of the State just referred to.

After the rendition of the judgment of the Supreme Court of Louisiana in question, the Legislature, at its session in the year 1884, passed Act No. 56, which is annexed hereto and printed as exhibit "B."

Assuming to act in consequence of the Act, the Common Council of the City of New Orleans adopted Ordinance No. 909, Council Series. The Act is annexed and printed as exhibit "C."

By virtue of the authority conferred in the ordinance, the then Mayor of the City assumed to enter into a notarial contract with the New Orleans Water Works Company, a copy of which is annexed and printed as exhibit "D."

Thereupon a committee of citizens composed of E. Conery, Jr., *et als.*, instituted judicial proceedings in order to have the contract, Ordinance No. 909, and Act 56 of 1884, annulled and set aside on various grounds. The Water Works Company and City of New Orleans were made defendants. The Company set up a special defense; the City, after excepting, pleaded the general issue.

Subsequent to this action there was a change in the administration of the municipality, and the Common Council passed Ordinance No. 3287, Council series, on Oct. 23, 1888, directing the City Attorney to amend the pleadings of the City, and to join the plaintiffs against the Water

Works Company. The ordinance is annexed and printed as exhibit "E."

Thereupon the City petitioned the Court to be permitted to file an amended and supplemental answer, wherein it is pleaded: "That, by the terms of Act No. 33 of the E. S. of 1877, the City is entitled to a supply of water from the New Orleans Water Works Company free of charge, and that the guarantee of this law to the City, securing to it the benefits of free water, has not been and can not be diminished without impairing the obligation of contracts, and thereby violating Article 1 Section 10 of the Constitution of the United States; and the City now pleads said Article 1, Section 10, and invokes the benefit thereof, and further pleads said Act No. 33 of 1877, E. S., as a part of this answer. That, notwithstanding the premises, the late Council of the City on the twenty-third day of September, 1884, did unlawfully pass Ordinance No. 909, C. S., whereby the terms of said Act No. 33 were attempted to be frustrated and set at naught, to the great detriment and injury of the City of New Orleans, and in derogation of the rights of the City and of those of the inhabitants.

"That in pursuance of said illegal ordinance, the late Mayor of the City entered into an alleged contract with the New Orleans Water Works Company Oct. 3, 1884, before Jos. D. Taylor, notary, and the said alleged contract is null and void; that it is under color of giving force and effect to another Act of the General Assembly of this State, to wit: Act No. 56 of 1884, in direct violation of the terms of said Act. No. 33, in that it imposes heavy and burdensome charges on the City of New Orleans for a supply of water, to be paid said Water Works Company contrary to the terms and guarantee of said Act No. 33.

"That the alleged contract here referred to, and Ordinance No. 909, which forms a part of this contract, and on which it is based, are *ultra vires*, null and void, the same being without authority of law, and in direct violation

of acts of the Legislature Nos. 33 of the extra session of 1877, 43 of 1878, 20 of 1882, and 56 of 1884.

"That in the decision in the cause of The City of New Orleans vs. The New Orleans Water Works Company, reported in the 36th Louisiana Annual Reports at page 432 *et seq.*, the Supreme Court of Louisiana placed a construction and judicial interpretation on said Section 11 of the Act No. 33, and that the Supreme Court, in deciding said cause, determined the effect of the legislative contract between the City of New Orleans and the Water Works Company by virtue of said Act No. 33 of 1877, and declared that the Water Works Company, under and by virtue of the said contract, has no power to demand or claim or require from the City of New Orleans, in any year, any sum for the water supply which it was bound under its Charter to furnish to the City, greater than the amount of the City taxes for that year. * * *

"That said Ordinance No. 909, is contrary to Acts Nos. 33 of 1877, and 56 of 1884, and the decree of the Supreme Court in said case of the City of New Orleans vs. New Orleans Water Works Company, and is in direct violation thereof, in this, that it ordains payment to the Water Works Company, of rates extortionately in excess of the amount fixed by the Legislature and accepted by said Company, under said Section 11, Act 33 of 1877, and the decree of the Supreme Court hereinbefore referred to; and actually amounting in the year 1885 to $68,340, while the taxes of said Company for that year are only $11,352." * * *

It is further pleaded:

That Ordinance "909 C. S. is an ordinance to carry out Act No. 56 of the Acts of 1884," as declared in the title to said Ordinance, and that it violates the Constitution of the State of Louisiana, (Art. 57, annexed and printed as exhibit "F.") which declares that the General Assembly shall have no power to release or extinguish, or to authorize the extinguishing, in whole or in part, the indebtedness, liability, or

obligation of any corporation or individual to this State, or to any parish or municipal corporation therein; and that the ordinance also violates Art. 45 of the State Constitution, which declares that the General Assembly shall have no power to grant, or to authorize any parish or municipal authority to grant any extra compensation, fee, or allowance to a public officer, agent, servant, or contractor.

The City of New Orleans, as has been seen, distinctly set forth in its amended and supplemental answer, that it had a valid and subsisting contract with the Water Works Company, contained in Section 11 of Act 33 of 1877, as interpreted by the Supreme Court of Louisiana, in the case reported in the thirty-sixth volume of Annual Reports. This is the judgment which has since been acquiesced in by the Company in this Court; and the City stood upon it, as being protected by Arts. 45 and 57 of the State Constitution, and by Art. 1, Section 10 of the Constitution of the United States. The position of the City is, that Acts No. 20 of 1882, No. 56 of 1884, Ordinance 909, C. S., and the contract thereunder, are invalid Acts to dispossess the City of the advantages of the contract without due process of law, and thereby to impair or to destroy the same.

Other grounds of nullity and illegality were alleged. The Water Works Company were duly cited to answer, and the decision of the Supreme Court of Louisiana in City of New Orleans vs. The New Orleans Water Works Company was specially pleaded by the City.

The Court of first instance rendered the following order on the application of the City of New Orleans to file the amended and supplemental answer, to wit: "Let this amended and supplemental answer be filed as prayed for, and the original pleadings herein amended accordingly."

The Water Works Company answered under protest.

The case hereupon progressed to trial, and there was judgment of the inferior Court in favor of the committee of citizens, E. Conery, Jr., *et als.*, the original plaintiffs, and against the City of New Orleans and the New Or-

leans Water Works Company, declaring Ordinance 909, and the contract between the City and the Company annulled, and forever enjoining the City from paying anything thereunder.

As this judgment of the Civil District Court for the Parish of Orleans, was in accordance with the petition and prayer of the City of New Orleans in its amended and supplemental answer, the City did not appeal. The only party who felt aggrieved was the Water Works Company, and it alone appealed to the Supreme Court of the State. The committee of citizens and the City of New Orleans, who necessarily became identified after the filing of the amended and supplemental answer by the City, thereby became appellees in the Supreme Court of Louisiana.

The judgment of the lower Court was reversed by the Supreme Court of the State. Act No. 56 of 1884, Ordinance No. 909, and the contract thereunder were declared legal and valid and binding on the City of New Orleans.

In its opinion, the majority of the Court held, that the City, under its police power, as set forth in its Charter, regardless of Act 56 of 1884, and in disregard of the contract rights contained in Section 11, of Act 33 of 1877, as determined in and vested by the final decision of the Supreme Court of Louisiana in the case of City of New Orleans vs. New Orleans Water Works Company, 36 An. p. 436, had the right to pass Ordinance 909 and to make the contract entered into thereunder. A decision was thus rendered by the Court, which deprived the City of its property rights in and to a contract, and in and to a final judgment in its favor, and setting aside and impairing the obligations of the contract, and in favor of the validity of the State statute and the authority of the Council exercised under the State, where the validity and authority of the statutes, ordinance, and contract are drawn in question. The effect is to deprive the City of New Orleans of property without due process of law, and the judgment is repugnant to Article 1, Section 10 of the Constitution of the United States. The law authorizing Ordinance 909

and the ordinance itself, are alleged by the City to be *ultra vires*, null and void. See exhibit annexed and printed as "G," for Section 7 of the Charter of the City of New Orleans, adopted June 23, 1882,

Thereupon the City of New Orleans, and Joseph A. Shakespeare, Mayor of the City, and entitled under the jurisprudence of the State in his capacity of chief magistrate to test before the courts the legislation of City ordinances, and E. Conery, Jr., *et als.* applied for and obtained writs of error from this Court to the Supreme Court of Louisiana.

Genois, Mayor, etc. vs. Lockett, et al., 13 La. R., 545.

The motion of the New Orleans Water Works Company to dismiss, now under consideration in this Court, is based upon the allegation that there is no federal question involved, and that the Court is consequently without jurisdiction. Without advancing further in discussion, the foregoing statement of the facts of the case must, it is submitted, defeat the motion.

The judgment of the Supreme Court of Louisiana became final Nov. 18, 1889. On the 26th day of November, at the last meeting of the City Council in the month, and at the meeting at which all financial ordinances are presented on their first reading, the bill of the New Orleans Water Works Company was presented, read and referred to the proper authority for examination.

On the twelfth day of December, the second meeting after its introduction, the ordinance was read in conformity with law a second time and finally passed. The Mayor's signature was thereupon affixed to it and the Water Works Company enabled to obtain its money from the City treasury, where it has had positive assurance and knowledge that it has been lying since the issuance of the injunction by the lower Court as being set apart by actual appropriation in the annual budget. There never has been at any time, or in any manner, any attempt on the part of the City to hold this money in the treasury by virtue of the writ of error issued herein. No claim has ever been set up to the effect that the writ operated as a supersedeas.

The Council was advised in writing to the contrary, and the letter of advice was published in the newspapers. These are facts which, while they may not appear in the Record, are recited simply for the purpose of showing that the Water Works Company is not now suffering pecuniarily, and never has suffered, on account of the writ herein; and also for the purpose of showing, that the City of New Orleans is abundantly able, willing, and anxious to discharge its contractual obligations to the Company. It is to this end that application is made to this Court to determine the same. The City of New Orleans now comes into Court, with conscious rectitude, and with clean hands.

ARGUMENT.

As the motion to dismiss has been filed by the defendants in error before the Record is printed, the pages can not be cited and the indulgence of the Court to that extent must be requested.

Nov. 2, 1885, E. Conery, Jr., *et als.*, residents of New Orleans, alleging themselves to be taxpayers to the City in a sum exceeding $10,000, brought suit against the City and the New Orleans Water Works Company, to restrain the execution of the contract entered into before Joseph D. Taylor, City Notary, between the City and said Water Works Company, Oct. 3, 1884, and to prevent the Council of the City from making any appropriation out of the public treasury in furtherance of the contract and of Ordinance No. 909, C. S., approved Sept. 26, 1884, authorizing it; and further asking that the contract and Ordinance in question, be declared null and void.

The petition charges as the ground of nullity, that the contract and Ordinance here referred to, are in express violation of the terms of the charter of the Water Works Company, and are *ultra vires*, unconstitutional, and therefore null and void. The petition sets forth at length the causes or reasons of the illegality and nullity by it propounded. These are all included, as well as enlarged upon, in the supplemental answer of the City.

May 27, 1887, the City apeared for the purpose of filing its answer, and pleaded the same as follows, to wit:

"And now comes Walter H. Rogers, City Attorney for the City of New Orleans, and for and in behalf of the City of New Orleans and all of the defendants, except the New Orleans Water Works Company, and reserving all and singular the exceptions hereinbefore pleaded herein, and in no manner waiving the same, for answer to the said plaintiffs' petition denies all and singular the allegations therein contained in manner and form, as the same are set forth and contained in said petition, and prays judgment against the said plaintiffs' demand with costs."

(Signed) W. H. ROGERS,
City Attorney.

A new City administration having been elected by the people, came into power Monday, April 23, 1888; and the Council thereunder, having so instructed the City Attorney, selected by themselves, by Ordinance No. 3287, approved Oct. 26, 1888, (a copy of which is annexed hereto, printed exhibit H), an amended and supplemental answer (not an *intervention*), leave of the Court being first had and obtained, was filed, setting forth the binding force and effect of the charter of the Water Works Company as interpreted by the Supreme Court in the case of City of New Orleans vs. The Water Works Company, 36 An. 432, averring the invalidity and nullity of Ordinance No. 909, and of the contract entered into thereunder between the former City administration, on behalf of the City, and the Water Works Company on various grounds; and among others, those especially charging that said Ordinance, enacted under the present City Charter of New Orleans, and being Act No. 20 of the session of the Legislature of 1882, or under Act No. 56 of 1884, together with said acts, if they permitted such an Ordinance, were in violation of Article 1, Section 10, of the Constitution of the United States, and in effect, deprived the City of New Orleans of her property in and to the contract contained in Section 11 of Act 33 of 1877, and of its rights in and to the judgment in its

favor in the case of City of New Orleans vs. New Orleans Water Works Company, 36 An. R. 432, without due process of law.

To say that the City had an *ex parte* order from the judge to file its amended and supplemental answer, is only to say that the City proceeded legally and in due form. The Code of Practice of Louisiana, Arts. 419 and 420, provides that, after issue joined, the plaintiff may, *with the leave of the Court*, amend his original petition. * * * The defendant may then amend his answer.

On application by the City to the Civil District Court in this case, the following order was issued: "Let this amended and supplemental answer be filed as prayed for, and the original pleadings herein amended accordingly.

(Signed) F. A. MONROE, Judge.

New Orleans, Nov. 2, 1888.

"An amendment to the petition once allowed forms "part of the pleadings, and plaintiffs' demand is precisely "what it would have been, had the original and amended "petition been filed at the same time; so that the Court "must decide on both, and can not give judgment on one "only."

Hennen's Digest, *verbo* Pleadings IX, par. 2, p. 1182.

Lanusse vs. Massicot, 3 Martin's (La.) Reports, p. 41.

King vs. Wartelle, 14 Annual (La.) Reports, p. 750.

The plea of defendant in error, that the City was judicially estopped from changing its position and joining E. Conery, Jr. *et als.*, the original plaintiffs in this cause, if allowed, would virtually behold the City responsible for all of the errors its officers might commit. Under such a view the City would be disabled from attacking any of the contracts entered into by its officers, except for fraud, and would be firmly bound thereby, and by all pleadings, however erroneous, filed by its representatives. But this is contrary to the settled jurisprudence of the State, to the law as laid down by the text writers, and to repeated decisions in this Court.

In Municipality No. 2 vs. New Orleans Cotton Press, 18 La. Reports, p. 24, Judge Martin said:

"Corporations in the civil law are considered as in a "continual state of pupilage; and their administrators as "the tutors of minors. Until very lately minors were en- "titled to relief in all cases in which they could show that "a proper defense had not been made for them. It is not "very clear that the same right does not exist in favor of "a corporation whose interests have been neglected by its "administrators. IN THOSE CASES THE CITY MIGHT HAVE "SACRIFICED ITS OWN RIGHT, BUT NOT THAT OF THE "PUBLIC."

In *Millaudon vs. the First Municipality of New Orleans*, 1 An. R. 215, where the evidence in the Record showed that much more important evidence existed, and was actually before the Court and within the power of the First Municipality, Chief Justice Eustis said:

"Those charged with the government of this munici- "pality and with the management of its important con- "cerns are not the parties in interest in this suit; it is the "taxpaying inhabitants who are to be affected by its result. "Were the former alone concerned, we should be justi- "fied in leaving them to the consequences of their own "acts; but we can not consent to adjudicate finally on the "right of the latter in a case presented to us as this is."

In *Delabigarre vs. Second Municipality*, 3 An. 235, 236, where it was urged on behalf of the plaintiff that there was no danger of eviction, because a certain judgment in Gravier's case formed *res judicata* between the plaintiff and the municipality, Justice Rost said:

"One of the essential requisites to maintain the excep- "tion *res judicata* is, *ut sit eadem causa petendi*. The "City, in *Gravier's* case, did not set up title to the bat- "ture, but claimed it exclusively as a *locus publicus*, "under a dedication by *Gravier*, and the use of the pub- "lic ever since the establishment of faubourg St. Mary. "The plea now made presupposes the issue to be the "same in this suit. It waives, therefore, the exception

" in the brief, that the defendants, having set up title in " themselves, are bound by that plea, and can not change " the nature of their defense. In conformity with the " views expressed in the case of *Millaudon vs. First Muni-* " *cipality of New Orleans* (1 An. 215), we would not in any " case of which we have the control be disposed to hold " the corporation responsible for the errors of their agents " in pleading or in defending suits; but here the very " ground assumed by the plaintiffs waives an informality " which might as well perhaps not have been alleged, as " the plaintiff herself had committed errors in her plead- " ings which she rectified in the supplemental petition."

In *Brown vs. Police Jury of Madison*, 4 A. 189, where the question of law presented was whether the plaintiff was bound to discuss the land upon which a certain levy had been made, before he could proceed against the parish, and the Court found that under the act of 29 the land was directly liable to the plaintiff, and that if he resorted to his remedy, the land would have been purchased by the Police Jury for a sum sufficient to pay him, and the privilege which he had would have thus inured to their benefit; Justice Rost said: " We think they can not be deprived " of this right. It is urged that the defendants have alleged " in their answer, that the remedies secured to plaintiff by " law were lost in consequence of the acts and omissions of " their officer, and that, under this judicial admission, the " plaintiff could proceed directly against the parish, as " was done in the case of *Newcomb vs. Police Jury, etc.* " *4 Rob. 233.*

" The defense of the Police Jury was perhaps ill ad- " vised. But the plaintiff has proved that it was un- " founded, and that all the formalities required had been " complied with. Considering that the Police Jury are " nominal defendants, and that it is the taxpayers of the " parish who are to be affected by our decision, we can " not hold them to allegations made in error by their " agents. Millaudon vs. First Municipality, 1 An. 215."

In *Benham vs. Parish of Carroll*, 28 An. 343, suit

had been instituted upon several parish warrants of the parish of Carroll, and the parish, through the District Attorney, answered, denying any indebtedness to plaintiff as set forth, and averring that the warrants sued on were issued without authority of law, and it was set up, that if the Police Jury had contracted any debt in favor of plaintiff or any former holder of the warrants, the parish was not bound, because the defendants creating the debt did not provide the means of paying the same; that no consideration for said warrants inured to the parish, and that they were procured by fraudulent combination between the plaintiff and the majority of the Police Jury. There was a judgment in favor of the plaintiff, and the parish appealed. Afterward a motion was made to dismiss the appeal, among other grounds, because the judgment was confessed in the lower Court by defendants.

Justice Howell said: "There is in the Record an ordi-
" nance of the Policy Jury, purporting to have been adopted
" after the institution of this suit, and after the defense
" was set up, and confessing judgment in this suit for the
" amount claimed.

" If the Police Jury were without authority to issue the
" warrant sued on, they were without authority to bind the
" parish by confessing judgment for their amount. Such
" action would be taking advantage of illegal or usurped
" authority, which courts of justice can not sanction. The
" lower Court seems not to have regarded the alleged con-
"fession. The motion is denied "

In *Marchand vs. Noyes et al., 33 An. 884*, where the plaintiff having recovered a final judgment against the Mississippi and Mexican Gulf Ship Canal Company, issued a *fi. fa.* and served garnishment process with interrogatories upon the City of New Orleans, and the interrogatories were taken for confessed, and it was shown that through some accident or inadvertence the matter had escaped the attention of the Mayor, the Supreme Court ruled, that it was clearly within the power of the Court

below, in the exercise of a sound discretion, to set aside judgment before signature, and grant a new trial. Justice Fenner said:

"We think, in the present case, its discretion was "soundly exercised for the reason assigned by the judge, "that a municipal corporation should not be made to "suffer for the unintentional neglect of an officer, like "the Mayor, overwhelmed with a multiplicity of public "duties."

In the learned work of Bigelow on Estoppel, Fourth Edition, p. 530, where that writer discusses the right of a corporation to deny the acts which it has assumed to do, he goes on to say:

"The more important question is, when, if at all, may a "corporation repudiate its undertaking by alleging that the "undertaking was without its powers? Great confusion "among the earlier authorities will be found in the answer "given to this question, nor are the recent cases in perfect "harmony. It appears, however, to be agreed by the "better authorities of the present time, that if the act "undertaken was in or of itself *ultra vires* of the cor-"poration, no act of the body will have the effect to estop "it, to allege its want of power to do what was undertaken. "The powers of the ordinary corporation being dependent "upon the statute which created the body, those powers "can not, of course, be enlarged by the body itself: and "the act in question being in itself *ultra vires*, the cor-"poration can not make it otherwise whether directly or "indirectly."

The same doctrine, supporting as it does, undoubtedly, the case of the City, now before the Court in the general, and, in particular, the attitude of the municipality upon the Record, is to be found in the text book of Judge Dillon on Municipal Corporations, Volume 1, page 450, Section 457. He says:

"The general principal of law is settled beyond con-"troversy that the agents, officers, or even the City Coun-"cil of a municipal corporation, *can not bind the corpora-*

" *tion* by any contract which is beyond the scope of its " powers, or entirely foreign to the purposes of the cor- " poration, or which (not being in terms authorized) is " *against public policy*. This doctrine grows out of the " nature of such institutions, and rests upon reasonable " and solid grounds. The inhabitants are the corpor- " ators; the officers are but the public agents of the " corporation. The duties and powers of the officers " or public agents of the corporation are pre- " scribed by statute or charter, which all persons " not only may know, but are bound to know. " The opposite doctrine would be fraught with such " danger, and accompanied with such abuse, that it would " soon end in the ruin of municipalities, or be legislatively " overthrown."

In *South Ottawa vs. Perkins*, 94 U. S., p. 261, where the town of South Ottawa had issued certain bonds by virtue of a pretended act of the General Assembly, duly published among the statutes of that State, and therefore *prima facie* valid, the Supreme Court of the United States held, that the town was not estopped from denying the passage of the Act, notwithstanding the holder of the bonds was a bona fide purchaser, without actual notice. The precise point of interest just here is, that the Court declined altogether to apply the doctrine of estoppel to the action of the municipality. It mattered not that the bonds in question had been uttered. It mattered not that the first installment of interest had been actually paid upon them. So much was in point of fact conceded; but what was of import in *South Ottawa vs. Perkins*, according to the doctrine of the Court, was whether the action of the town in issuing the bonds had been authorized. Said the Court:

" It would be an intolerable state of things if a docu- " ment, purporting to be an act of the Legislature, could " thus be a law in one case and for one party, and not a " law in another case and for another party; a law today " and not a law tomorrow; a law in one place and not a " law in another in the same State. And whether it be a

"law or not a law, is a judicial question, to be settled and "determined by the Courts and judges. The doctrine of "estoppel is totally inadmissible in the case."

In *Anthony vs. County of Jasper*, 101 U. S. 697, the Supreme Court enforced a like ruling with that in *South Ottawa vs. Perkins*. A township in Missouri voted to subscribe for stock. The proper county court made the subscription, and ordered issuance of the bonds. These were issued, sealed with the seal of the court, signed by the clerk and by a certain person as presiding justice, who, however, did not become so until some time afterward. His action had not been consented to by the county court nor his Associate Justice, and the bonds were not registered, certified and endorsed, as the law of the State required.

The Court said: "Dealers in municipal bonds are "charged with notice of the laws of the State granting "power to make the bonds they find on the market. "This we have always held. If the power exists in the "municipality, the *bona fide* holder is protected against "mere irregularities in the manner of its execution, but if "there is a want of power, no legal liability can be "created."

So in *Northern Bank of Toledo vs. Porter Townshtp, Trustees*, 110 U. S., p. 612, it was decided by the Supreme Court, that a township is not estopped from showing that a corporation is without legislative authority to issue bonds, and this, notwithstanding payment of interest by it upon the same for years.

The Court said: "The fundamental proposition "advanced in behalf of plaintiff is, that immediately upon the passage of the act of March 21, "1850, Porter Township was vested with power to "make a subscription to the stock of the Company, "that the non-authorization of the commissioners, by a "vote of the electors, to make a county subscription, was "only a condition precedent to the exercise of that "power: consequently, that the township is estopped by

" the recitals in the bonds, and its acquiescence for a " series of years, as evidenced by payments of interest, " to rely upon the non-fulfillment of that condition. In " this construction of the acts in question we are unable " to concur."

It appears, it is submitted, and conclusively, from the reasoning and from the authorities which have now been laid before the Court, that the City of New Orleans, if it can be shown that Ordinance No. 909, C. S., adopted and approved under the late City Administration, and the contract before Joseph D. Taylor, of date Oct. 3, 1884, are beyond the powers of the municipality, are not in law binding upon it, and if the pleading filed in behalf of the City in the time of the administration, which has been referred to, imports any admissions, that the City is relievable from all effects of the same, and completely reinstated in its capacity as a litigant by the order rendered by the Civil District Court on the occasion of the filing by the City of the amended and supplemental answer.

The rule of practice in the State of Louisiana is clear and familiar. Amendments may be allowed at any stage of the cause for the furtherance of justice. They are reducible to no certain rule, and must be left to the sound discretion of the Court. The true principle is, that an amendment should or should not be permitted to be made, as it would best tend to the furtherance of justice.

If this conclusion be correct, the right to amend and supplement its pleadings in this case belongs clearly to the City of New Orleans, and was properly exercised. The amendment must therefore stand, and the evidence offered by the City be admitted thereunder. If, indeed, to take this position involves error, then is the City reduced to a condition which would be deplorable. Its interest and welfare must be constantly, if not, at least, very often imperiled. But this can not be, nor has it ever been under-

stood to be the case, nor to accord with the law and practice of the Courts of Louisiana.

Apart, however, from this view, it is submitted, that it was for the Court below to say when the supplemental and amended answer in question was tendered, whether it was allowable. Having permitted it at that time, and consented to the amendment as therein prayed for, reformation of the pleadings was accomplished and is now complete; nor can the action of the court be now recalled. The act sought to be disputed, is over and can not be undone.

Having endeavored to establish, that the City of New Orleans was properly before the Court below, as plaintiff on the trial of this cause, it now becomes necessary to show that this Court has jurisdiction to review the judgment of the Supreme Court of Louisiana.

As has been indicated already, one of the allegations in the amended and supplemental answer of the City is, that Ordinance 909 and the contract thereunder are in violation of the terms of the contract entered into by the State of Louisiana and the Water Works Company, for the use and benefit of the City of New Orleans, and as contained in Section 11 of Act No. 33 of 1877. The City stood in form and manner upon the contract, and proceeded to invoke the Federal Constitution, Article 1, Section 10, in its aid and for its protection.

Successive Constitutions of the State of Louisiana have made of New Orleans, and her first Judges have found in the City, a permanent functionary of Government.

Hennen's Dig. Vol. 2, p. 970. Verbis New Orleans, H. C., No. 7.

Justice Rost in EGERTON VS. MUNICIPALITY, 1 ANN. R. 437, declares that the City is entitled to peculiar powers and privileges; and the Supreme Court of the United States, speaking by Justice Field in *United States vs. New Orleans*, 98 U. S., p. 393, has correctly observed that the powers of the City authorities are unusually enlarged.

The City is a political corporation, recognized in the Constitution, but chartered by the Legislature. Among

other privileges granted, it is given the right to pass ordinances. In pursuance hereof it adopted Ordinance 909 in the forms prescribed in the Charter, and either by virtue of the charter, or in supposed conformity with Act No. 56 of 1884, Ordinance No. 909 has the effect of an enactment of the Legislature. Roderick vs. Whitsen, 4 N. Y. S. Reports 112.

As has been seen, the amended and supplemental answer of the City of New Orleans, set up and formally pleaded a valid and subsisting contract entered into between the State and the Water Works Company, for the benefit of the inhabitants of the City: That the late Mayor of the City and the Water Works Company had attempted to enter into a different and more onerous contract than the one made by the State with the Company, and to bind the City under the contract: That the Mayor had acted under an illegal, null, and void ordinance, No. 909, and that the action of the City Council and the Mayor was *ultra vires*, null, and void, and did not and could not bind the City and deprive it of its contractual and judicially determined rights under Section 11 of Act 33 of 1877, and the judgment of the Supreme Court of Louisiana in the case of CITY OF NEW ORLEANS VS. THE NEW ORLEANS WATER WORKS COMPANY, 36 ANN. R. 432.

The effort to do this on the part of the legislative department of the City Government, is an evident attempt to deprive the citizens of New Orleans of their property in said contract without due process of law; and is consequently violative of Article XIV, Section I, of the amendments to the Constitution of the United States.

In its pleadings in the present suit, the Statutes, the Ordinance, and the authority in question, and any and all Statutes authorizing said Ordinance and Contract, the City alleges to be invalid, on the ground, among others, of their being repugnant to the Constitution of the United States, Art 1, Section 10. Now, the decision rendered by the Supreme Court of Louisiana, to which error is attributed, is in favor of their validity, and furthermore, that decision

deprives the City of its rights in and to the contract of 1877, and of a former judgment rendered by the same Court in its favor.

The Court in its decision says: "The City of New "Orleans by virtue of her inherent police powers, then had "a right to contract with reference to a water supply for "the public health, and to extinguish fires. * * *

"In making the contract now attacked, did the City of "New Orleans exceed any limitation placed upon her in "the exercise of her police powers? Her Charter is silent "as to restrictions. In it there is no regulation of any "price as to the water to be supplied, nor is there any "restriction as to the quantity or the character of the "water. Act 56 of 1884 authorizes the City to contract "for either clear or filtered water, and gives the City full "discretion as to price and conditions. * * *

"In the instant case, the City of New Orleans had full "power to contract, without restraint as to price, quality "or kind of water. * * *

"The City, like a person, having the power to do so, "can alter, change, or abrogate her contracts with the "consent of the other contracting party. * * *

"We are of opinion that independent of any statutory "provision subsequently enacted, authorizing the City to "contract for her water supply, that she had the full and "plenary power to do so under the provisions of her "*Charter*. * * *

"We conclude that Act 56 of 1884, does not violate the "Constitution of the State, and that *Ordinance No. 909*, "passed by the City Council in pursuance of said act, *is a* "*valid ordinance*, and that the contract made between the "City of New Orleans and the Water Works Company "in pursuance of the power vested in said City by its "present Charter and said Act 56 of 1884, and said ordi-"nance, dated Oct. 3, 1884, and passed before J. D. "Taylor, notary public, on said day, is a legal and valid "contract."

The jurisdiction of this Court has been already established by the pleadings and by the decision of the Supreme Court of Louisiana just quoted from. The allegation of the City to the effect that Ordinance No. 909, passed by authority of the State, and the State statutes authorizing the passage of the same, impaired the obligation of the contract entered into between the State and the Water Works Company, for the benefit of the City, as evidenced by Section 11 of Act 33 of 1877 is too clear, it is submitted for serious doubt.

The other allegation of the city is that the said statutes and ordinances are *ultra vires*, null and void. It results necessarily that the citizens of New Orleans are deprived of their property without due process of law. The decision of the Supreme Court of Louisiana takes from and dispossesses the City of the benefits of its contract, and of its rights under the final judgment in its favor in City vs. New Orleans Water Works Company, 36 Ann. 432.

The officers of the City, it is submitted, are not at all in the case of persons acting individually. They differ from such persons in many ways. To mention none other, they act in a fiduciary capacity, and they can only act in the manner and concerning those matters indicated in the law which authorizes them to act. Under the State Constitution of 1879, the Legislature itself, apart from every other consideration, is expressly disabled from authorizing a municipality under color of contracting, to diminish the obligations of any contractor.

Concerning the matters involved in the instant case, the State Legislature had, in 1877, exercised power to contract with the Water Works Company, and taken that power away from the City of New Orleans. The Legislature themselves made a contract with the Company. The City, therefore, was expressly deprived, it is believed, under its then existing Charter, and is deprived under its present Charter, (Act No. 20 of 1882, see exhibit "G.") "from altering, changing, or abrogating her contract with "the consent of the other contracting party." It is submitted, accordingly, that the Supreme Court of Louisiana

fell into manifest error in making the ruling under consideration; and when it decreed the validity of the contract in question, and that of Ordinance 909, and that of the State Statutes authorizing the same; and it is further submitted, that the effect of this decision of the Court is to deprive the citizens of New Orleans of their property by finally enforcing the illegal State and municipal legislation involved.

In addition to the illegality and nullity, which are thus made apparent, it is to be observed, that the ordinance complained of is null and void, because, in point of fact, as well as of law, the City Charter, Act 20 of 1882, confers no authority on the Council to abrogate the contract made by the State with the Water Works Company. The Charter is absolutely silent on the subject, and so long as the New Orleans Water Works Company is in operation, the contract in question can not be interfered with, without the special consent of the State, as one of the parties thereto.

The State of Louisiana did not, by Act 56 of 1884, and she could not give her consent to the City of New Orleans to "alter, change, or abrogate her contract, with the consent of the Water Works Company," for the reason that Article 57 of the Constituion of 1879, provides: "The General Assembly shall have no power to *release* or extinguish, in whole or in part, the indebtedness, liability, or *obligation of any corporation* or individual, to this State, or to any parish *or municipal corporation therein*."

To argue then, as is done for the Water Works Company, that the City of New Orleans may alter, change, or abrogate its contract with that Company, now under consideration, is to assume that the City may release or extinguish, in whole or in part, the indebtedness, liability, or obligation of said corporation to itself, in flagrant violation of the provisions of the article of the Constitution just quoted, as part of the organic and fundamental law.

Article 45 of the Constitution of 1879, also provides

that: "The General Assembly shall have no power to grant or *to authorize any parish or municipality authority to grant any extra compensation, fee, or allowance* to a public officer, agent, servant, or *contractor*."

The City of New Orleans, conformably with express constitutional enactment, is chartered by the State Legislature. The powers of its agents and officers are carefully defined in the Charter, and can not, under elementary principles, extend beyond the provision of law fixing them. The Legislature is, *totidem verbis*, prohibited by the State Constitution, from granting or from authorizing the municipality to grant, any extra compensation or allowance, or to release from its obligation the Water Works Company in its character of contractor. We have, notwithstanding, as has been shown, Act 56 of 1884 and Ordinance No. 909, which attempt to do the very things which are so prohibited; and the judgment of the Supreme Court of Louisiana, herein involved, has actually proceeded to declare the act and ordinance to be valid. The citizens of New Orleans would thus evidently be divested of their rights and property by the force and effect erroneously allowed the act and ordinance without due process of law—for, being *ultra vires*, the act and ordinance are unmistakably NULL AND VOID, and ought to have been so pronounced.

It will be seen, by reference to exhibit "G," that the City of New Orleans has received special recognition in the Constitution of Louisiana as a legal entity or personality distinct from the State. By Arts. 45 and 57 of the same instrument (see exhibit "G"), the contract rights of the city are in so many words recognized and protected. The rights in question are, therefore, notwithstanding they are those of a political corporation, just as fully entitled to the guarantee of the Constitution of the United States, as any other contract rights are, whether of individuals or of eleemosynary institutions.

Properly understood, what is here observed, involves no departure at all from the admitted general doctrine, that mu-

nicipal charters, as enabling acts, do not constitute contracts in the sense of the National Constitution. Articles 45 and 57 of the Constitution of Louisiana of 1879 being applied, as they must necessarily be, to the case before the Court, evidently take it from out of the general doctrine, and vesting as against the defendant Water Works Company, as they undoubtedly do, the benefits secured by section 11 of Act 33 of 1877, the articles referred to, secure and perpetuate those benefits to the City of New Orleans against all impairment.

The articles of the Constitution of Louisiana represent a new State policy. They constitute the barrier erected by the people of Louisiana, against the designs and assaults of public contractors. Legislative acts and rules of law only subsist in subordination to the Constitution. As the act of the people themselves, the Constitution is paramount.

Views like in character with those here given, found expression in this case in the Supreme Court of Louisiana, although they may have failed of approval with the majority of the Court. Speaking as one of the minority, Justice Fenner said:

"The legal status, then, of the rights and obligations of "the parties under the legislative contract embodied in the "Charter of the Water Works Company have been definitely "and irrevocably fixed. The city was irrefragably en- "titled to receive annually the supply of water stipulated in "the act, and it was bound to pay therefor precisely the "amount of taxes levied by it on the property of the com- "pany during the same year, and not a cent more could "be claimed by the company. While the city was legally "entitled to have her water supply, under the charter, for "a price of about $20,000 per annum, the contract herein "involved obliges her to pay a minimum price of $68,340 "per annum for the water supply stipulated for, being a "difference of more than $2,000,000 for the whole term "of the contract. The first question that inevitably arises "under the foregoing statement is: What is the differ-

" ence between the water supply required by the charter " and that stipulated in the Ordinance contract?

"A comparison of the terms of the charter provisions " with those of the Ordinance and contract shows conclu- " sively that there is no substantial difference in the obli- " gations imposed on the company by the respective instru- " ments, certainly none that could serve as the slightest " support for the enormous excess of price.

" The last appeal of the Company is to Act No. 56 of " the General Assembly of 1884, passed after the decision " rendered by this Court. That act is ambiguous in its " terms, and it is needless to discuss its provisions and its " phraseology.

" It either authorized this contract (of 1884) or it did " not. If it did not, there is an end to its pertinency. If it " did, it clearly violates the following articles of the Con- " stitution, viz.: Article 45, which declares: 'The General " Assembly shall have no power to grant or authorize any " parish or municipal authority to grant any extra com- " pensation fee or allowance to a public officer, agent, " servant, or contractor;' and Article 57, which declares " that 'the General Assembly shall have no power to release " or extinguish, or to authorize the releasing or extinguish- " ing, in whole or in part, the indebtedness or liability of " any corporation or individual to the State, or to any " parish or municipal corporation thereof.

" The applicability of these two articles is too patent to " need comment. If, under its charter, the Water Works " Company was bound to furnish the water annually for a " compensation not exceeding the amount of its taxes, " how could the legislature authorize the city to pay such " contractor an extra compensation of $45,000 per annum? " And if such was the liability of the Water Works Com- " pany, how could it be released or extinguished by sub- " stituting therefor a different and vastly less onerous " liability?"

The State of Louisiana is clearly only what the people have ordained and established to be the State by the Con-

stitution. Its capacity to acquire rights, and perhaps even to be subject to some obligations, is settled by the Constitution. That instrument has seen fit to protect the rights of municipalities, and these can not be assailed by the State itself, simply because the Constitution expressly protects them from invasion. Spring Valley Water Works vs. Schottler, 110 U. S. 348.

The people of Louisiana, in convention assembled in 1879, as set forth in the State Constitution of that year, secured to the municipality of New Orleans and the inhabitants thereof, all the rights and advantages accruing or to be derived from the contract entered into in 1877 between the State and the New Orleans Water Works Company, defendants in error, for and on behalf of the City of New Orleans.

What the people of the State have done, in the exercise of their sovereign will, can not be undone or set aside by the State Legislature. The people have the right to define and limit the exercise by the legislature of the police power, as has been held by this Court in New Orleans vs. Houston, 119 U. S. 266. So, too, the people having acted as they did, with reference to State and municipal contracts and contractors, all parties are irrevocably bound.

Here, it is submitted to the Court, is not a question as to whether the State or City, in the exercise of its police power, can or can not disregard or authorize the disregarding of a contract, with the consent of the other contracting party. The true issue, is whether the citizens of the City of New Orleans can be deprived of their property in the contract under consideration, by having the terms of the same impaired by an act of the legislature or Common Council of New Orleans, which act is *ultra vires*, null and void, as being in direct opposition to a clear, plain and unambiguous provision of the Constitution of the State, securing the citizens in the possession and enjoyment of the contract.

The language of Andrews, Judge, as the organ of the Court of Appeals, of New York, in *The People ex rel.*

The Manhattan Savings Institution of the City of New York, Appellant, vs. Norton P. Otis, Mayor, etc., Respondents, is of direct application here. Says the Chief Judge:

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision." 90 N. Y. 52.

It is submitted, indeed, that the jurisdiction in this Court is evident to pass upon the inviolability of the contract, contained in Act No. 33 of the Acts of the General Assembly of Louisiana of 1877, and the rights of the citizens of New Orleans thereunder; and, further, to review the decision of the Supreme Court of Louisiana, which has the effect of declaring the contract to be abrogated, and of holding to be legal and valid, the statutes of the State of Louisiana, and that of the ordinance of the City of New Orleans, which seek to impair the terms of the contract.

It has now been abundantly shown that the Statutes in question are alleged by the City and its citizens to be *ultra vires*, null, void, and of no effect, and contrary to the Constitution of the United States and Amendment XIV, and to the Constitution of the State of Louisiana.

The Mayor of the City of New Orleans has applied to this Court to have the decision of the Supreme Court of Louisiana reviewed; the City of New Orleans is here for the same purpose; the committee of citizens composed of E. Conery, Jr., *et als.*, are here also. Nevertheless, the Court is asked by the defendants in error, to dismiss the appeal of the City because the judgment of the State Supreme Court is not against the city of New Orleans.

It has been sought to be shown that since the filing of the amended and supplemental answer of the City, the latter and the citizens, in effect, are one and the same party; that the judgment of the Civil District Court in favor of E. Conery, Jr., *et als.*, being in accordance with the prayer of the city in its amended and supplemental answer, was virtually a judgment in its favor; that the city became joint appellee with E. Conery, Jr., *et als.* when the Water Works Company took the appeal from

that judgment to the Supreme Court of Louisiana, and that the judgment of the Supreme Court of Louisiana adjudging the statutes, ordinance and contract involved to be legal, subsisting, valid, and binding, in favor of the Water Works Company, is a judgment adverse and injurious to the City as well as to its co-suitors, E. Conery, Jr., *et als.* This position finds support and recognition in the Supreme Court of Louisiana as well as in Courts of other States.

Handy vs. New Orleans, 39 La. An. 107.
Conery *et als.* vs. Water Works Company, Ib. 770.
Crampton vs. Zabrinski, 101 U. S. 601.
New London vs. Brainard, 22 Conn. 552.
Baltimore vs. Gill, 31 Md. 379.
97 Ind. 1.
Cooley on Taxation, p. 548.
Dillon on Mun. Corp. 914 to 937, and authorities in notes.

ON MOTION TO AFFIRM.

The motion to affirm is united with the motion to dismiss, and as the motion can only prevail where it is manifest that the writ was taken for delay merely, or that the question on which the jurisdiction depends is so frivolous as not to need further argument, the attention of the Court is called to the evident fact that the City has nothing to gain by delay. There is no injunction against the Water Works Company. It is working under its Charter, and deriving all the benefits claimed by it under its contract made with the City in pursuance of Ordinance No. 909. It has received every dollar due to it under the terms of that extraordinry contract. All that the City asks under the writ herein, is that the Ordinance and contract be annulled: but in the meantime, the City is necessarily controlled by the unjust and illegal terms thereof. It must remain remediless, unless relief is granted to it by this Court.

In furtherance of the view that the question on which the jurisdiction of this Court depends is not frivolous, and

that it needs a full argument, the following conclusions are submitted, that:

Act 33 of 1877, known as the charter of the Water-works Company, is binding upon said Company, the State of Louisiana, and the City of New Orleans.

Act 56 of 1884, whereunder the Company seeks to escape from the obligations of the charter, did not authorize Ordinance 909; nor did Act 20 of 1882, the City Charter, authorize said Ordinance No. 909.

If the acts did authorize the passage of the ordinance, then they are unconstitutional, and the ordinance itself, purporting to have been enacted in pursuance of Act 56 of 1884, is *ultra vires*, and in fraud of the rights of the City.

The defendant company was incorporated by Act 33 of 1877 (extra session), the 11th section of which reads as follows, towit:

"That the City of New Orleans shall be allowed to use "water from the pipes and plugs of said company now laid, "or hereafter to be laid, free of any charge, for the extin- "guishment of fires, cleansing of the streets, and for the use "of all public buildings, public markets, and charitable in- "stitutions; and that the said company shall place, free of "any charge whatever, two hydrants, of the most improved "construction, in front of each square where a main pipe "shall be laid, at a suitable distance from each other, from "which a sufficient quantity of water may be conveniently "drawn for the extinguishment of fires, for watering the "streets, and cleansing the gutters, and for any other public "purpose; that on the squares which do not front on the "river the hydrants shall be placed on opposite sides of the "streets, at an equal distance from each other and the cor- "ners. It shall be the duty of the said company, whenever "main pipes shall be laid, to supply water for all the pur- "poses herein mentioned at all times during the continuance "of this charter, and in consideration thereof the franchises "and property of said New Orleans Water Works Com-

"pany, used in accordance with this act, shall be exempt "from taxation, State, municipal, and parochial."

Sec. 12 confers upon the company the right to use the public streets, and to appropriate private property.

Sec. 13 requires the company, immediately after its organization, to erect "new works and pipes "sufficient in capacity to furnish a full and adequate "supply of water, to be drawn from the Mississippi "river or elsewhere, as may be judged most expedient, "that said work * * * shall be commenced within "twelve months * * * so that within five years from "the passage of this act they shall be completed so as to "give an adequate supply of water to the people of the City "of New Orleans," etc.

By Act 43 of 1878 the "adequate supply of water," as provided for by the Act of 1877, is construed to mean a supply at a height of 15 feet wherever the pipes exist; and the exemption from State taxation is withdrawn.

In 1881 the city authorities, conceiving that the exemption from city taxation, as contained in the Water Works Company's charter, was unconstitutional, sued for the tax of that year claimed to be due upon its property, works, etc.; and the Water Works Company, setting up the exemption in question as a defense to the suit, further claimed that if said exemption was not allowed by the court, then, that the city must pay for its water, since the obligation to furnish the water was based upon the exemption from taxation, and would cease to exist with the failure or withdrawal of the exemption.

The amount of the tax claimed by the City was $11,-484.87, whilst the value of the water furnished for the year in question was stated to have exceeded $40,000; so that, upon the company's theory, the balance was largely in its favor, and its contract was an onerous one from which it was interested (to the extent of over $28,000 per annum, as matters then stood) in being released. The case was tried in the Civil District Court and judgment was rendered in favor of the city for the amount of the tax claimed,

and in favor of the company for the amount claimed as the value of the water furnished. Upon appeal, however, it was held by the Supreme Court:

1. That the exemption from taxation was unconstitutional, and hence, that the judgment of the court *a qua*, in favor of the city, for the amount of said tax, should be affirmed.

2. That the provisions of the company's charter providing for the free water supply and for the exemption from taxation, contemplated and intended that the one should be the exact equivalent of the other.

3. That the exemption from taxation was not, however, the sole consideration for the water supply, but that there were other considerations given besides; and, hence, that the withdrawal of the exemption relieved the company of its obligation to furnish water free of charge only *pro tanto*; that is to say, only to the extent of the amount of the tax which might be claimed, to which extent it was held that the City should pay for the water furnished.

Such, according to the learned judge who presided in the Civil District Court, and such, there can be no doubt, was the interpretation put upon the eleventh section of the charter of the Water Works Company by the Supreme Court; and the company clearly together with the city, was bound thereby; but a short time after the rendition of the judgment of the Supreme Court the Legislature adopted Act 56 of the session of 1884. Concerning this act the opinion of Judge Monroe proceeds:

"The main spirit of the act appears to have been to "authorize and require the city, in any case where it exacted "taxes from the company, to pay the value of the water "furnished in the year for which the taxes should be so "exacted."

"The fifth section, however, provides that 'nothing in "this act shall be construed as in any manner abridging or "otherwise affecting any of the rights, franchises, and priv-"ileges heretofore granted to said company, but all such

" rights, franchises, and privileges shall continue and be-
" long to said company.'

" And this provision is important in view of Article 245
" of the Constitution, which provides that ' the General
" Assembly shall not remit the forfeiture of the charter of
" any corporation now existing, or renew, alter or amend
" the same, nor pass any general or special law for the ben-
" efit of said corporation, except on the condition that said
" corporation shall hereafter hold its charter, subject to the
" provisions of this Constitution.'

" The act in question is obviously a 'special law for the
" benefit of said corporation' (meaning the Water Works
" Company), and if the company accept its benefits, it must
" do so subject to the constitutional provision which has
" been quoted, but this the company appears unwilling to
" do. And the act itself in the fifth section, which has
" been quoted, seems to provide distinctly that no interpret
" ation shall be given to it which, by subjecting it to the
" dominion of the Constitution, might endanger the grants
" contained in it.

" In view of the provisions of Article 57 of the Consti-
" tution, however, it appears to me immaterial whether the
" act in question is accepted or not, as it would be equally
" inoperative in either case." That article reads as fol-
lows, towit:

" Art. 57. The General Assembly shall have no power
" to release or extinguish, or to authorize the releasing or
" extinguishing, in whole or in part, the indebtedness,
" liability, or obligation of any corporation or individual to
" this State, or to any parish or municipal corporation
" therein: provided, that heirs of confiscated property may
" be released of all taxes due thereon at the date of its
" reversion to them."

" From the facts as presented in this case and in the
" case reported in the 36 An., it appears that the amount of
" water which the company is bound, under its charter, to
" furnish to the city, far exceeds in value the amount of
" taxes which are exacted from it. And yet, under the

" decision which has been quoted, the obligation to furnish " the water still subsists subject only to the qualification that " compensation equal in amount to the taxes exacted may " be claimed, whilst in so far as the water exceeds such " taxes in value it must be furnished free of charge. It, " therefore, follows that in requiring the city to pay for all " the water which it gets (in the event of its demanding the " tax), and providing specially that unless it sets apart a " sufficient sum to make such payment the company shall " not be compelled to deliver water, as provided in its char- " ter, the Legislature is releasing or extinguishing an obli- " gation which has been ascertained and defined by the " Supreme Court of the State, from the company to the " City of New Orleans, within the meaning of the con- " stitutional prohibition.

" My conclusions upon this point, therefore, are that the " defendant company, declining to accept or refusing to " admit its acceptance of the Act 56 of '84, and failing to " waive the stipulation of section 5 of said act, supposing " such waiver to be competent, is not entitled to claim the " benefits contemplated by said act; and that the act in " question, if otherwise operative, would release the com- " pany from an obligation of great importance to the City of " New Orleans, and, hence, is violative of Article 57 of " the Constitution.

" After the passage of the act, which I have thus " referred to, towit, in September, 1884, the City Council " passed an ordinance authorizing a contract to be made " between the city and the Water Works Company for the " carrying out of the ideas expressed in said act."

" In fact, the ordinance bears the title, ' An ordinance " to carry out Act No. 56 of the Acts of 1884, providing for " a future water supply from the New Orleans Water Works " Company to and for the City of New Orleans and certain " institutions, and regulating the use of water and the " payment therefor.' "

" And agreeably to its provisions a contract was entered " into whereby the city agreed to pay for all the water to

" be furnished by the company during the term of its char-
" ter (say fifty years from 1877), and whereby it was sti-
" pulated that the minimum number of fire plugs for which
" payment should be made (at the rate of $60 each) should
" be 1,139, so that the least that the city can hope to get
" off with is over $68,000 per annum, whilst the actual
" amount which she may be required to pay may exceed
" that sum."

" It would seem sufficient to say that an ordinance and
" contract passed and made for the avowed and expressed
" purpose of carrying out an unconstitutional Act of the
" Legislature could not be given effect. It is said, how-
" ever, that the act in question is wholly immaterial to the
" ordinance and contract which were so passed and
" made, and that they can stand without the aid of said
" act, even though their only declared purpose was to carry
" it out."

" Assuming this position to be tenable in the abstract,
" it can not be maintained in this particular case, for the
" reasons:

" That the purpose and effect of the contract made
" between the Water Works Company and the city, as
" disclosed not only by the title of the ordinance pursuant
" to which said contract was made, but by the context of
" said ordinance and said contract, construed in the light of
" the facts disclosed upon the trial of the case, were to
" carry out said act of the Legislature, with some conditions
" of additional stringency as to the City of New Orleans.

" That the City of New Orleans has no power, whether
" directly or indirectly, to give away money collected from
" the taxpayers, and the payment of many thousands of
" dollars per annum for that for which the Supreme Court
" of the State has decided nothing need be paid, is in legal
" contemplation a gift, no matter in what shape it may be
" disguised."

Act 56 of 1884 is, it is submitted, violative of the Constitution, for reasons which are additional to those given by the learned Judge.

This Act is entitled: "To provide for the supply of water to the City of New Orleans by the New Orleans Water Works Company, in cases of the municipal taxation of said Company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the City of New Orleans to contract for the same; to regulate the payment of taxes imposed on said Company contrary to the exemption given in its charter, and to put into effect section 11 of Act No. 33 of Acts of 1877, E. S., in instances of refusing or contrary to the exemption therein."

The Act violates Article 29 of the Constitution of 1879, which declares that every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in the title; whereas Sections 1, 2, and 3, of said Act 56, interpret and seek to enforce as one object Section 11 of Act No. 33 of 1877. Section 4 embraces as another and a second object, this, towit: The authority to the City of New Orleans to contract for a supply of clear and filtered water; and Section 5 embraces as another and a third object, this, towit: That it preserves and reserves all its rights, franchises, and privileges to the Water Works Company. *State vs. Harrison, 11 An. 722; 32 An. 1013.*

Act 56 also violates paragraph 13 of Article 46 of the Constitution. That paragraph declares that the General Assembly shall not pass any local or special law on the following specified objects: * * * Creating corporations, or amending, renewing, extending, or explaining the charters thereof; whereas Sections 1, 2, and 3 of the Act do renew, extend, and explain the charter of the New Orleans Water Works Company.

Finally, Act 56 violates paragraph 14 of the same Article, which paragraph provides that the General Assembly shall not pass any local or special law on the following specified objects, towit: Granting to any corporation, association, or individual any special or exclusive right,

privilege, or immunity; whereas, Sections 4 and 5 of the Act do give to the Water Works Company the exclusive privilege to furnish clear and filtered water to the City of New Orleans and the inhabitants thereof.

It was, indeed, as is pointed out by Judge Monroe, under pretext of conforming to Act 56 of '84, that Ordinance 909, C. S., was adopted by the City Administration in Sept., 1884, and the contract under the Ordinance, consummated before the City Notary, between the Water Works Company and the City of New Orleans. Instead, however, of giving effect to the rights of the City, this Ordinance evidently sought to defeat and frustrate them. It fixed, as has been seen, in point of fact $68,400 per annum as the liability of the City for a supply of water, in violation of the decision of the Supreme Court of the State, and contrary to the finding of the Court, that the charter of the Water Works Company, in consideration of the monopolistic grant of fifty years to supply the inhabitants of New Orleans with water, was bound to do this for the value of the taxes only. Ordinance No. 909 must be memorable, moreover, for having absolutely ignored and for having left out entirely the main object for which Act 56 of 1884 purports to be adopted by the Legislature. The City means here to speak of a supply of clear or filtered water by the Water Works Company for the safety, welfare, and comfort of the people. The Ordinance and the contract under it make no mention whatsoever of clear or filtered water, but the startling result is thoroughly established in the record; that the Water Works Company have never supplied, or attempted to supply, any except muddy Mississippi water, and even that only in notoriously inadequate quantity.

It remains to say something to repel the unjust clamor in which the Water Works Company persist in this case. This has been unceasing. Their position is understood to be, that the rights of the Company are contractual rights, and that the efforts to overthrow them are tainted with bad faith, because they are those of parties who, while they

make war upon the obligation of contracts in general, seek at the same time to escape from their own, in particular. It will be found on examination that this view has nothing to rest on, except the assumption of the Company who, as interested litigants, indulge themselves in its constant repetition.

It has been abundantly shown, that the contract between the Water Works Company and the City, before Joseph D. Taylor, in pursuance of Ordinance No. 909 was, as well as the Ordinance itself, *ultra vires*, and that it is upon elementary law, consequently, null and void. But that is not all. The contract and the ordinance in question have been shown to be in fraud of the supposed enabling Statute No. 56 of the Acts of 1884, and the Statute itself to be unconstitutional. The moral strength and advantage in behalf of the Water Works Company, when they rest their case on these foundations, is in consideration of the character of them, and of the circumstances surrounding, not to be understood, unless it be by parties like themselves biased by the risk of parting with large profits, such as those which are evidently at stake in the present litigation.

But let that pass. The error in the view taken by the Company of their suit is a still greater one than has been yet pointed out. It reaches further than any other, and is indeed the capital vice of their case, and underlies their presentation of it everywhere. It is meant here to refer to the charge of the company, that the City of New Orleans was bound under the eleventh section or the Water Works charter, known as Act 33 of 1877, in consideration of the use of water free of charge, to exempt the Company from municipal taxation; and that when, notwithstanding, suit was brought, to recover the taxes, the city thereby invaded and at last overthrew the sacred obligation of its own contract.

The answer here is an easy and direct one. The City has done no such thing as is charged. So far as Section 11 of Act 33 of 1877 is concerned, there were only two

parties thereto: the state of Louisiana of the one part, and the Water Works Company of the other. It was the act of the State and that of the Company, and was in favor of the Company, which procured the passage of it in the ways disclosed by the record. Section 11 in question stipulates, it is true, some advantage in favor of the City of New Orleans. The Legislature, which was engaged in bestowing a gigantic and monopolistic privilege on the Water Works Company to supply the people of New Orleans for fifty years with water, might be supposed naturally to have some care for the capital city of the state: and the Water Works Company must just as naturally be held to have made some sort of concession to public opinion in return for all the advantages which it secured to itself. But the Legislature added, in point of fact, nothing to the numerous privileges of the Company when it conferred on it exemption from municipal taxation.

The Constitution of 1868, then in full force, did not permit this. The Legislature, equally with the other departments of government, exercised their functions under the domain of that instrument, and were bound by it. Indeed, the rule that neither municipal authority nor the State Legislature could exempt property from taxation, whether by commutation or in any other way, is settled not only in the Constitution itself but in a long line of well considered decisions by the Supreme Court of Louisiana. It must be taken for granted that the General Assembly, when it indulged in vain legislation to announce to the world that it had exempted the Water Works Company from municipal taxation, was not wholly ignorant of the Constitution, and certainly it will not do to contend that they were without acquaintance with the decisions of the Supreme Court of the State. It is evident, on the contrary, that they knew perfectly of the constitutional prohibition which prevented property being freed from city taxation, and were well advised that the tribunals of the State had insisted upon observance of it. If, then, the Company took the charter with section 11 in the same, it

was so accepted subject to all disadvantages, as well as with benefit of all of the advantages of the situation. What hopes they may have nursed that the Constitution of the State would not actually be enforced and that the Company would thus escape taxation from the municipality were their own. It is not even pretended that the city had anything to do with exciting them, and if they have turned out to be fallacious and delusive, those who conceived them are clearly without right of any kind to complain. The Company, as has been said, were parties to that contract with the State, and although they once resisted the terms thereof, there is a final judgment of the Supreme Court of Louisiana in which they voluntarily acquiesced by dismissing, on their own motion, in the Supreme Court of the United States, the writ of error originally sued out. The judgment of the Supreme Court of the State referred to and the evidence of acquiescence are to be found of record in case of New Orleans Water Works Company, plaintiffs in error, vs. City of New Orleans, defendants in error—No. 73 on the docket of this Court.

In the recent case of the *Spring Valley Water Works vs. Schottler*, 110 *U. S.*, 348, the legal issue presented is not unlike that of the New Orleans Water Works Company in the instant case, and was dealt with and disposed of by this Court upon principles similar with those here expressed.

In *Spring Valley vs. Schottler*, the general question involved is whether the Water Works Company in California, formed under the Act of 1858 of that State and before the adoption of the Constitution of 1849, had a right to charge their customers such prices for water as may from time to time be fixed by a commission, two selected by the Company, two by the public authorities of the locality, and if need be, a fifth selected by the other four, or by the sheriff of the county. Afterwards, in 1878, the Board of Supervisors of the City and County of San Francisco, appointed four commissioners,

and those, later on, named a fifth, who met, the Act of '58 to the contrary notwithstanding, and fixed a tariff of rates for the *Spring Valley Water Works*, to go into effect on the 1st of June, '78. The Water Works Company resisted, but there was judgment against them.

Chief Justice Waite, who spoke for the Court, said:

"The Constitution of California adopted in 1849 prohibited one legislature from bargaining away the power of succeeding legislatures to control the administration of the affairs of a private corporation formed under the laws of the State. Of this legislative disability the Spring Valley Company had notice when it accepted the privileges of the act of 1858, and it must be presumed to have built its works and expended its moneys in the hope that neither a succeeding legislature, nor the people in their collective capacity when framing a constitution, would ever deem it expedient to return to the old mode of fixing rates, rather than on any point of power to do so, if found desirable. * * *

"The organization of the Spring Valley Company was not a business arrangement between the State and the company as contracting parties, but the creation of a new corporation to do business within the State, and to be governed as natural persons or other corporations were or might be. Neither are the chartered rights acquired by the company under the law to be looked upon as contracts with the City and County of San Francisco. The corporation was created by the State. All its powers came from the State and none from the City or County. As a corporation it can contract with the City and County in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may from time to time be made by proper authority. The provisions for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchises

" conferred on any corporation, formed under the statute, " and indissolubly connected with the reserved power of " alteration and repeal."

The point made by the Water Works Company, that there is a failure of joiner of parties in the present appeal, for the reason that the City Comptroller and Treasurer have not been severally cited, is clearly destitute of merits. The City Charter provides that the City of New Orleans " shall have a seal and may be sued," etc. The Comptroller and Treasurer of the time of the institution of this controversy are *functi officiis*. Their successors have never been nominally parties. The city is the true party in interest; and the corporation and all of its officers, are necessarily impleaded when the city is.

In consideration of the foregoing argument, and of the authorities supporting it, the motion of the defendants in error to dismiss and affirm ought to be denied.

Respectfully submitted, CARLETON HUNT,
City Attorney of New Orleans, and Attorney for Joseph A. Shakespeare, mayor of the city.
Jan. 4, 1890.

APPENDIX.

[EXHIBIT A.]

Act No. 33, E. S. of 1877.

AN ACT

To enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the "New Orleans Water Works Company;" to authorize the said Company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of Water Works bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the City of New Orleans.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That a corporation be, and the same is hereby created, to be styled "The New Orleans Water Works Company," the capital stock whereof shall consist of two millions of dollars, which shall be divided into twenty thousand shares of one hundred dollars each.

Sec. 2. *Be it further enacted, etc.*, That immediately after the organization of the said Water Works Company, as hereinafter provided, it shall be required to issue to the city of New Orleans, stock to the amount of six hundred and six thousand six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of Water Works bonds which said city may have taken up heretofore and extinguished by payment, exchange or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of Water Works bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this Act; and the said Water

Works Company shall issue to the said city of New Orleans, to be exchanged with the holders of said bonds, one share of full paid stock, not subject to assessment, for each and every one hundred dollars of said Water Works bonds; and the said bonds, as fast as surrendered and exchanged for stock as aforesaid, be cancelled; that for the purpose of effecting said exchange of outstanding Water Works bonds for stock, as aforesaid, the city of New Orleans shall be entitled to all the certificates for the shares of said stock of said New Orleans Water Works Company, and shall, by advertisement for six months in two newspapers in the city of New Orleans, and two newspapers in the city of New York, give notice tnat it will exchange said stock at par for said Water Works bonds at par, exclusive of the overdue coupons attached to said bonds, which shall constitute a separate demand against said city; and in case any of the said bondholders shall fail or refuse to avail themseives of this Act within one year from the formation of said company, the said city of New Orleans shall not thereafter be required to make said exchange, but may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.

Sec. 3. *Be it further enacted, etc.*, That the said Water Works Company shall be organized by the Mayor of the city giving thirty days' notice that he will receive subscriptions of bondholders who may agree to exchange their bonds, for stock as aforesaid; and the said city shall at once subscribe for stock to the amount of six hundred and six thousand six hundred dollars, and such further amount as shall equal the par value of any of said Water Works bonds, which shall have been extinguished by said city; and as soon as in addition to the subscription of said city there shall be subscribers for an exchange of said bonds for stock to the extent of five hundred thousand dollars, and the said amount of bonds shall have been actually surrendered to and cancelled by the Administrator of Finance, the said subscribers shall assemble together, on a day to

be named by the Mayor, and shall elect a board of directors, to consist of seven persons, four of whom shall be designated by the Mayor, and the remaining three shall be elected by said subscribers, other than said city, from amongst themselves; and the persons thus designated and elected shall constitute the first board of directors, and shall continue in office until the first of July, eighteen hundred and seventy-eight, and the said board shall elect one of their number as president.

Sec. 4. *Be it further enacted, etc.*, That as soon after the election of said board of directors as the City Council may determine, the Mayor of the city shall transfer, by notarial act, to said New Orleans Water Works Company the water works and all the property appurtenant thereto.

Sec. 5. *Be it further enacted, etc.*, That the said Water Works Company shall own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this Act the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting and constructing any necessary works, or engines, or machines for that purpose; that it may contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion may require, through which it may be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city; and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the rivers from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs, as may be required for securing and carrying a full supply of pure water to said city and its inhabitants; to enter upon and survey such lands as it may think proper, in order to ascertain the best mode of furnishing a supply of water; to lay and place any number of conduits, or pipes, or aqueducts, and to cleanse and repair the same,

through or over any of the lands or streets of the city of New Orleans; *provided*, the same shall not be an obstruction to commerce or free circulation; and also to have and use a common seal and alter the same at pleasure; to ordain and establish by-laws for its government and that of its officers and employees, not repugnant to this Act and the constitution of the State and of the United States, or the ordinances of the city of New Orleans.

Sec. 6. *Be it further enacted, etc.*, That on the first Monday of July, eighteen hundred and seventy-eight, and annually thereafter, an election for directors of said Company, after ten days' notice of the time and place of holding the same, shall be held, at which election there shall be elected four directors by all the stockholders other than the city of New Orleans; and the Mayor of the city, the Administrator of Water Works and Public Buildings, and the Administrator of Finance of said city, shall be *ex-officio* directors of said company; the said city, through its Mayor and Administrators, shall have the right to vote at the election of directors, and at all meetings of said stockholders in the same manner as any other stockholders. That at all elections and all meetings of stockholders each share of stock shall be entitled to one vote. The directors elected shall serve for one year, and shall hold their offices until their successors are appointed; and no failure to elect directors at the time designated shall prevent the board of directors from fixing another day for holding the election; and in case of vacancy in the board of directors occasioned by death, resignation, or absence from the State or other cause, the board of directors may fill such vacancy for the remainder of the year.

Sec. 7. *Be it further enacted, etc.*, That the stock owned by said city of New Orleans in said Water Works Company shall not be liable to seizure for the debts of said city.

Sec. 8. *Be it further enacted, etc.*, That the stock of said Water works Company may be increased to two millions of dollars, for the purpose of enabling said company

to improve, enlarge, and extend its works: *provided*, that the new or increased stock shall be paid for in cash, or in work done for the company; and in case of non-payment of installments on stock subscribed for, the same may be forfeited to the use of said company.

Sec. 9. *Be it further enacted, etc.*, That the board of directors of said company shall have power, in addition to the authority to increase its capital stock, to borrow money for the purpose of improving and enlarging its works, and increasing the supply of pure water; and to accomplish this purpose the said board of directors are hereby authorized to issue the bonds of the company to an amount not exceeding two millions of dollars, and in such sums, on such terms, and bearing such rate of interest, as said board may determine, and the payment of said bonds, in principal and interest, may be secured by a mortgage of all the property and franchises of said company, including its franchise to be a corporation, and said mortgage may include the property and franchises of said company, acquired or to be acquired, and the registration of said mortgage in the office of the Recorder of Mortgages for the Parish of Orleans, shall operate on the property and franchises of said company, wheresoever situated, and shall be and continue a valid and subsisting mortgage until the payment of the debt secured by it, without reinscription; *provided, however*, that no bond shall be issued, or mortgages given, without the consent of the Council of the city of New Orleans, and said bond shall not be sold or disposed of except on such terms as shall be approved by said council of said city.

Sec. 10. *Be it further enacted, etc.*, That said company shall not declare or pay any dividends except in cash, and then only out of the net semi-annual or annual receipts, after payment of expenses of operation, and the interest on its bonded debt, nor shall any dividends be declared until the contemplated works are completed and in use.

Sec. 11. *Be it further enacted, etc.*, That the city of New Orleans shall be allowed to use water from the pipes

and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets, and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Water Works Company, used in accordance with this Act, shall be exempt from taxation—State, municipal, and parochial.

Sec. 12. *Be it further enacted, etc.*, That the said Water Works Company shall have the right, in the city of New Orleans and its suburbs and adjoining lands, to use the streets and public places for the purpose of laying pipes and hydrants to run water; *provided*, that said streets shall not be obstructed longer than necessary for such purpose, or for making repairs, and that said streets shall be restored to the same condition they were in as soon as practicable, by the said company, under the supervision of the City Surveyor. In case the said Water Works Company shall require any lot of ground in the city of New Orleans, or any lot of ground or quantity of land situated in any parish of this State, for the purpose of constructing reservoirs or other works, or for the purpose of laying pipes to conduct water to the city of New Orleans, and shall not be able to agree with the proprietor or proprietors of said lot of ground or land, the said company shall have power

to cause the same to be expropriated in pursuance of the general laws on the subject of expropriation for works of public utility now in force, or which may hereafter be enacted, and if the object of said company be merely to lay pipes through a piece of land or lot of ground, the expropriation shall be confined merely to the servitude it may require, and not to the right of absolute ownership.

Sec. 13. *Be it further enacted, etc.*, That the said Water Works Company, immediately after its organization, shall proceed to the erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as may be judged most expedient; that said new works and pipes shall be commenced within twelve months from the passage of this Act, and shall be year by year completed, so that, within five years from the date of this Act, they shall be completed so as to give an adequate supply of water to the people of the city of New Orleans, exclusive of the Fifth District. If said work be not done as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the city shall have a right to contract with any one else for a supply of water as above provided, and to expropriate the property of the corporation hereby created. After the completion of the new works and pipes, the said company shall, from time to time, as the wants of the population may require, and when the estimated revenue on the cost of such extension shall equal ten per centum, extend their works throughout the entire limits of the city and suburbs, and any future extension of said city; and any failure by said Water Works Company to comply with this provision shall work a forfeiture of this charter.

Sec. 14. *Be it further enacted, etc.*, That the city of New Orleans, through its council, shall have authority to apply the stock subscribed for by said city, as herein provided, to the reduction of the bonded or floating debt of the said city, on such terms of adjustment as may be mutually agreed upon between the City Council and the

holders of such bonded or floating debt; *provided*, said stock shall not be sold at less than par, and that when sold for obligations of the city, it shall only be under sealed proposals, after not less than fifteen days' advertisement in two daily papers, to the bidder who shall offer said obligations at the most advantageous rate, the council reserving the right to reject any and all bids.

Sec. 15. *Be it further enacted, etc.*, That the said Water Works Company shall have the right to fix the rates of charges for water; *provided*, that the net profits of the company shall not exceed ten per cent per annum, and shall publish sworn annual statements of its business and condition: and that the City Council shall have the power to appoint a committee, of not less than five, who shall have access to the books of the said company, and make such extracts from the same as they may deem necessary, and in case the said profit shall exceed ten per cent, the City Council shall have the right to require said company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates; *and provided further*, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

Sec. 16. *Be it further enacted, etc.*, That if any person or persons shall obstruct the said company, their successors, agents, workmen, or servants, in conveying the said water into the said city and its suburbs, or shall change, alter, remove, injure, or destroy any work or part of a work made by the said company, or cause to be made, for the purpose of introducing water into the city of New Orleans, under the authority of this act; or if any person shall alter, change, or pollute the water or stream which the said company shall hereafter introduce, or be preparing to introduce, such person or persons shall be indicted in the proper court for the trial of such offense, and being thereof convicted, shall be fined at the discretion of the court, according to the nature of the offense, and imprisonment

for a term not exceeding seven years, such fine to be paid and applied to the use of said company.

Sec. 17. *Be it further enacted, etc.*, That until other works are constructed by which the present works may be dispensed with, the same shall remain under the control of the City Council, and the superintendence thereof remain in the hands of the Administrator of Water Works and Public Buildings; but the said company shall be authorized to collect the revenues thereof and apply them to the expense of operating and extending the works. At the expiration of fifty years from the organization of the company, the city shall have a right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by five experts: two to be named by the city, two by the company, and the four to select the fifth expert: but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter.

Sec. 18. *Be it further enacted, etc.*, That nothing in this Act shall be so construed as to prevent the City Council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

Approved March 31, 1877.

(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy: WILL A. STRONG,
Secretary of State.

[EXHIBIT B.]

No. 56] AN ACT

To provide for the supply of water to the City of New Orleans, by the New Orleans Water Works Company, in cases of the municipal taxation of said Company: to authorize provision to be made for the payment of water supplied and to be supplied: to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the City of New Orleans to contract for the same; to regulate the payment of taxes imposed on said Company contrary to the exemption given in its charter and to put into effect Section 11 of Act No. 33 of Acts of 1877, E. S., in instances of refusing or contrary to the exemption therein.

Whereas, Due notice and advertisement has been given and made of the intention to apply for this Act pursuant to Article 48 of the Constitution of this State; and

Whereas, The New Orleans Water Works Company is being subjected to municipal taxation notwithstanding the exemption from taxation granted by its charter in consideration of water to be supplied to the City of New Orleans; and

Whereas, It is possible and desirable to furnish the inhabitants of New Orleans with clear or filtered water from the Mississippi river; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That in all instances of the taxation of the franchises or property of the New Orleans Water Works Company for any year or years by or for the City of New Orleans, or for municipal purposes, whether such taxation be for past or future years, and the said Company be in any manner obliged to pay, notwithstand-

ing the exemption granted in Section 11 of Act No. 33 of Acts of 1877, E. S., then, in all such instances, the said City of New Orleans is hereby empowered and required to pay the said Company the value of all the water the said Company has supplied or shall supply during any year or years, for which said taxes have been or shall be levied, to or for the use and purposes of the City of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires or other public purposes.

SEC. 2. *Be it further enacted, etc.*, That in all instances of such taxation, contrary to said exemption, or any future year or years, the City of New Orleans shall provide in its budget, or shall set apart and appropriate a sum sufficient to pay for the said water supply for said year or years; and unless this be observed and done, the said Company shall not be compelled to deliver water for the uses and purposes aforesaid.

SEC. 3. *Be it further enacted, etc.*, That any taxes already imposed for any year, contrary to said exemptions, shall not be exacted, nor any penalty or interest accrued be demanded thereon, or any begin to run until said City shall have provided for the payment of the water supplied in said year, or provision made therefor by remedy at law or equity.

SEC. 4. *Be it further enacted, etc.*, That to secure the inhabitants of New Orleans and to the use of the City a supply of filtered or clear water, the City of New Orleans be and is hereby empowered to contract with the said Company, and determine upon terms and conditions, and fix a price for obtaining from said Company such supply of clear or filtered water.

SEC. 5. *Be it further enacted, etc.*, That nothing in this act shall be construed as in any manner abridging or otherwise affecting any of the rights, franchises and privileges heretofore granted to said Company; but all

such rights, franchises and privileges shall continue and belong to said Company.

SEC. 6. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent herewith, be and are hereby repealed, and this act shall have effect from and after its promulgation.

H. W. OGDEN,

Speaker of the House of Representatives.

CLAY KNOBLOCH,

Lieut. Governor and President of the Senate.

Approved 7th July, 1884.

S. D. McENERY,

Governor of the State of Louisana.

A true copy from the original:

OSCAR ARROYO,

Secretary of State.

[EXHIBIT C.]

OFFICIAL.

MAYORALTY OF NEW ORLEANS,
City Hall, Sept. 25, 1884.

No. 909—Council Series.

AN ORDINANCE to carry out Act No. 56 of the Acts of 1884, providing for a future water supply from the New Orleans Water Works Company to and for the City of New Orleans and certain institutions, and regulating the use of water and the payment therefor.

Whereas, The City of New Orleans has been, and is, and will be, unable to allow the New Orleans Water Works Company the fifty years exemption from taxation, being the consideration for a free supply of water, contemplated by Section 11 of Act No. 33 of the Acts of 1877; and the Courts having decided that the exemption from municipal taxation granted in said Act is not, and shall not, be enjoyed, and, therefore, as is also decided, that the City must pay for the water supplied by said Company, and

Whereas, It is best to arrange for a fixed annual price for said water supply, rather than leave the City liable to an annual demand, the amount of which can not be known in advance, and from which the City can not be relieved, but is specially authorized and required to provide for the payment therefor, and

Whereas, The said New Orleans Water Works Company is willing to accept terms, arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to the number of fire hydrants, fire plugs, or fire wells, now numbering eleven hundred and thirty-nine (1,139) in this City; therefore,

Section 1. Be it ordained by the City Council of the City of New Orleans, That during the term of the Charter of the New Orleans Water Works Company, beginning

with the year 1885, the supply of water for which this Ordinance provides, shall be furnished by the said Company, from the pipes and plugs of said Company, now laid or hereafter to be laid, for the following purposes, to wit: For the extinguishment of fires and cleansing of the gutters; for the use of all existing public buildings, public markets, public squares or parks, public schools, and the public charitable institutions supported and to be established and supported by the state and city and now supplied by the said company, it shall be the duty of said company to keep and maintain a head or pressure of water of not less than fifty feet head, between the hours of 7 A. M. and 6 P. M.; and the reservoir supply at night and between these hours shall be of such abundance as amply to cover the needs of the fire department for extinguishing fires; and said Company shall make such provision as may be necessary to reinforce or supplement said reservoir supply in case of need or accident. In consideration for said supply, the City of New Orleans shall pay, during the term of said Company's Charter, to the said New Orleans Water Works Company sixty dollars ($60) per annum for each and every fire plug, fire hydrant, and fire well connected with the mains or pipes of said Company, of which said fire plugs, fire hydrants, and fire wells there are now eleven hundred and thirty-nine (1,139), which number shall ever be the least measure of the annual sum to be paid to said Company, and for every additional hydrant, fire plug, or fire well exceeding said number, hereafter attached to said pipes or mains, the city shall pay an additoinal sixty dollars ($60) per annum.

Sec. 2. Be it further ordained, That the City of New Orleans shall have the power in times of drouth to furnish water to such persons as may live outside the lines the pipes of said Water Works Company, free from all charges, by the same, and shall have further power by Ordinance duly passed and notified in writing to said Company, before each annual appropriation for said supply, to decrease or increase number of fire plugs, fire hydrants,

and fire wells for the ensuing year, all such Ordinances to designate the locations for the new attachments or intended cut-offs; provided, however, that the number of said fire hydrants, fire plugs, and fire wells be not reduced below eleven hundred and thirty-nine (1,139), the intent thereof being that the annual price to be paid for said water supply shall never be less than as fixed herein; by reference to the now existing number of said fire plugs, fire hydrants, and fire wells, but the City expressly reserves the power to change the location of any and all of said plugs, hydrants, or wells, whenever the Council shall deem it necessary, said change to be at the cost of the Company.

Sec. 3. Be it further ordained, etc., That the City of New Orleans shall annually set apart, appropriate, and provide in its annual budgets of expenditures and receipts, beginning with those for the year 1885, and in all successive budgets for each year successively, a sum sufficient to pay for said annual water supply, as fixed in the foregoing sections of this Ordinance; and that said annual sum or price shall be paid to said New Orleans Water Works Company in twelve equal and monthly installments, one on the last day of each consecutive month, beginning in the month of January, 1885, for the year 1885; and beginning also in the month of January in each year thereafter; and in event of prompt cash payments of said installments during each year, the City of New Orleans shall be entitled to deduct and retain from the last installment in each year 6 per cent of the entire amount paid and payable to the said Company in and for said year; but should any installment be unpaid when due, it shall bear interest at the rate of 8 per centum per annum, from the end of the month in which it was payable, until finally paid.

Sec. 4. Be it further ordained, etc., That it is hereby made the duty of the Comptroller or Auditing Officer, and of the Treasurer of said City of New Orleans, carefully to set apart and keep, as a distinct fund, the moneys or collections which shall have been appropriated in each year, pursuant to this Ordinance, and such proportion of all col-

lections of the revenue as shall have been appropriated in the budgets to and for said Company, or the said water supply for each year, shall be carefully and exactly set apart by said officers, as collected; and shall be warranted for by said Comptroller and paid by said Treasurer to said Company, during each month, without further direction, ordinance, or authority than that hereby given.

Sec. 5. Be it further ordained, etc., That the New Orleans Water Works Company shall have the right to inspect and examine into the use of water to be supplied, under this Ordinance, and the City of New Orleans and its officers shall see that no water is taken or used except for the purpose aforesaid, and that there shall be no waste nor more water taken and used, than may be actually necessary for the purposes aforesaid; and to this end the City of New Orleans shall adopt all proper measures or ordinances to prevent waste and to prevent any use of water except for the purposes herein designated; and it is hereby made the duty of the officers of said City and of those of any and all public buildings, and public institutions, and of all persons using water under this Ordinance, to prevent waste and to prevent the use of such water except for the actual need for the purposes aforesaid.

Sec. 6. Be it further ordained, etc., That the Mayor be and is hereby authorized and directed to execute a contract by Notarial Act to and with said Company, embodying and carrying out the provisions of this Ordinance.

Sec. 7. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent or in conflict with this Ordinance, be and the same are hereby repealed.

Adopted by the Council of the City of New Orleans, Sept. 23, 1884.

M. McNAMARA,
Clerk of Council.

Approved Sept. 26, 1884.

J. V. GUILLOTTE,
Mayor.

A true copy:
TH. BUISSON,
Secretary to the Mayor.

[EXHIBIT D.]

CONTRACT UNDER ORDINANCE No. 909.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
PARISH OF ORLEANS, CITY OF NEW ORLEANS.

Be it Known:

That on this third day of the month of October, in the year of our Lord, one thousand eight hundred and eighty-four and of the independence of the United States of America, the one hundred and ninth, before me, Joseph Dewey Taylor, a notary public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and Official Notary of the City of New Orleans, and in the presence of the witnesses hereinafter named and undersigned—personally came and appeared:

The Honorable Joseph Valsin Guillotte, Mayor of the City of New Orleans, herein acting in his official capacity as Mayor aforesaid, being herein and hereunto specially authorized and empowered by Ordinance Number 909, Council Series, adopted by the Council of the City of New Orleans, on the 23d day of September, A. D., 1884, a duly certified copy of which Ordinance is hereto annexed and made part hereof.

Also came and appeared Mr. Albert Baldwin, President of and herein representing the New Orleans Water Works Company, being herein and hereunto specially authorized and empowered by a resolution of the Board of Directors of said Water Works Company, passed at a meeting of said Board held in the City of New Orleans on the 27th day of September, A. D., 1884, a certified copy of which resolution is hereto annexed and made part hereof.

Whereupon said Albert Baldwin, in his said capacity as

President, declared and does hereby declare that he accepts all and singular the terms, conditions, provisions, obligations, rights, benefits and advantages set forth and contained in said Ordinance No. 909, adopted by the Council of the City of New Orleans, on the 23d day of September, A. D. 1884, and approved by the Mayor on the 26th day of September, A. D. 1884, thereupon duly promulgated, and which said ordinance, so accepted by said Baldwin, President, is in the words and figures following, towit: (Here follows Ordinance No. 909, C. S. See Exhibit "C.")

And said Joseph Valsin Guillotte, Mayor, and said Albert Baldwin, President, having each read and declared himself fully cognizant of the contents of said Ordinance, do severally declare that they do hereby contract, engage, and agree, one with the other, according to the terms, provisions, conditions and language of said Ordinance; all and singular of which, said terms, conditions, provisions and language shall be and is hereby made a contract, engagement and agreement between said parties, the City of New Orleans and the New Orleans Water Works Company; to be observed and carried out and held and maintained inviolate during the entire term and existence of the said New Orleans Water Works Company, its assigns or successors, as now fixed in the Charter of said Company, being a period of fifty years from the incorporation of said Company.

The said Albert Baldwin, as President aforesaid, engages to furnish and supply water from the pipes of said Company in the manner, at the times and for all purposes and objects as set forth in and pursuant to the provisions and requirements of the said Ordinance No 909, Council Series; to furnish or supply water to and for the public places, buildings and institutions as in and by said Ordinance required; to allow the City of New Orleans in time of drought, said state or condition of drought to be decided by the Board of this Company and the City Council, to furnish

water to such persons as may live outside the lines of the pipes of the said Company for the needs of said persons, without waste, and by such means of transportation by carts, wagons, barrels or like appliances as said City may provide and furnish, all pursuant to the intent and purpose of sections second and fifth of said Ordinance; to observe and obey any ordinance duly notified to said Company directing the increase of the number of fire plugs, fire hydrants and fire wells, or the decrease thereof, provided said decrease be not below eleven hundred and thirty-nine (1139) in number, all according to section third of said Ordinance, and further he engages and contracts, as President aforesaid, to do, perform, and give and to observe, carry out and fulfil all things required of said Company by or in said ordinance.

In consideration whereof said Joseph Valsin Guillotte, Mayor, aforesaid, engages and contracts to pay unto said Company annually the sum of sixty (60) dollars, for each and every fire plug, fire hydrant and fire well connected with the mains or pipes of said Company, of which there are now eleven hundred and thirty-nine (1139), and which number shall ever be the least measure of the annual sum to be paid said Company; to pay said Company annually sixty (60) dollars for every additional hydrant, fire well or fire plug exceeding said number of eleven hundred and thirty-nine (1139) and hereafter attached to said mains or pipes; to notify said Company in writing of all decrease or increase required of said plugs, hydrants or wells, to make promptly, fully and specially the annual appropriations and monthly payments as required by and in section three of said ordinance, the City to deduct or retain from the last monthly payment in each year six per centum of each annual sum paid and to be paid said Company as provided in said section three; to hold and set apart and keep as a distinct fund, the moneys or collections as required by said ordinance, and upon request or demand of said Company on the last day of each month in any year the Comptroller of the City shall warrant on the Treasurer

for, and the Treasurer shall pay from said money or collections, the installments which at that time shall be due, without other authority or ordinance than said ordinance; and the Comptroller or Auditing Officer and the Treasurer of the City shall faithfully carry out and promptly obey all the requirements and provisions of the fourth section of said ordinance and shall raise no obstacle nor impose any delay in obeying the same; and, it shall be the duty of each, in his respective department, to keep all money and collections appropriated under said ordinance and this contract, as separate from all other moneys and as a distinct fund, all pursuant to and in accordance with said section four.

The said Company shall have the right to inspect and to examine into and concerning the use of water supplied by it, and none of said water shall be wasted or used otherwise than for the purposes named in said ordinance and to the extent of the actual need for said purposes, all as provided in section five of said ordinance, and to this end the officers and persons designated in said section five and the City of New Orleans, shall do, perform, and abstain from doing the things set forth in said section five of said ordinance.

Further it is agreed and understood and stated by and between the said parties that the specifications or detailing in this instrument of the several rights, duties, obligations and things to be done, performed, observed, carried out or abstain from respectively, does not and shall not limit, modify or in any manner take from the effect of any of the terms, conditions, provisions or expressions of said ordinance, all of which are by these presents accepted and made binding, effective and operative upon and between the said New Orleans Water Works Company and the City of New Orleans, their assigns or successors, for and during the term named in the Charter of said Company.

Thus done and passed in my office in the City of New Orleans, aforesaid, the day, month, and year first afore-

said, in the presence of Charles G. Rebentisch and George B. Goetz, witnesses, residing in this Parish, who have signed their names with the said parties and me Notary.

Original signed:

J. V. GUILLOTTE,
Mayor.

ALBERT BALDWIN,
President of the New Orleans Water Works Company.

C. G. REBENTISCH,
GEORGE B. GOETZ,
J. D. TAYLOR,
Notary Public.

A true copy of the original.

New Orleans, May 10, 1888.

J. D. TAYLOR,
Notary Public.

[EXHIBIT E.]

MAYORALTY OF NEW ORLEANS,
City Hall, Oct. 27, 1888.

No. 3287—Council Series.

An Ordinance directing the City Attorney to amend pleadings filed in the Civil District Court, Parish of Orleans, on behalf of the City in case No. 15,744 of the docket of the Court, and entitled "Edward Conery, Jr., and others vs. The New Orleans Water Works Company, the City of New Orleans, and others," and also directing him to join in plaintiffs' demand to annul the alleged contract of the City of New Orleans, under Ordinance 909, C. S., with the Water Works Company, as beyond the powers of the late City administration, and in fraud of the rights of the City; and further directing the City Attorney to proceed in said suit for the best interests of the City of New Orleans.

Section 1. Be it ordained by the City Council of New Orleans, that the City Attorney, on behalf of the City, at present a defendant of Record in suit 15,774, of the Civil District Court, entitled "Edward Conery, Jr., *et al.* vs. The New Orleans Water Works Company, *et al.*," be and he is hereby directed to amend, with leave of the Honorable the Civil District Court, for the Parish of Orleans, the answer of the city therein, and to join in plaintiffs' demand, and to proceed in order to cause to be vacated the alleged contract under Ordinance 909, C. S., between the city and the New Orleans Water Works Company, of date, Oct. 3, 1884, before J. D. Taylor, notary, and to have the same pronouced null and void, and of no effect, as being detrimental to the public rights and interest, beyond the powers of the late city administration, and in fraud of the rights of the city.

Sec. 2. Be it further enacted, etc., That the City Attorney be and he is hereby authorized to take such further

action in pursuance of this ordinance, relative to said cause No. 15,774, and entitled "Edward Conery, Jr., and others vs. the New Orleans Water Works Company, the City of New Orleans, and others," as he may deem necessary for the best interests of the City.

Sec. 3. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent with or contrary to the provisions of this ordinance, be and the same are hereby repealed.

Adopted by the Council of the City of Orleans, Oct. 23, 1888.

ED. T. MANNING,
Clerk of Council.

Approved Oct. 26, 1888.

A true copy: JOS. A. SHAKSPEARE,
WRIGHT SCHAUMBURG, Mayor.
Secretary to the Mayor.

[EXHIBIT F.]

Extracts From the Constitution of Louisiana of 1879.

Article 253. The citizens of the City of New Orleans, or any political corporation which may be created within its limits, shall have the right of appointing the several public officers necessary for the administration of the police of said City, pursuant to the mode of election which shall be provided by the General Assembly.

Art. 254. The General Assembly, at its next session after the adoption of this Constitution, shall enact such legislation as may be proper to liquidate the indebtedness of the City of New Orleans and apply its assets to the satisfaction thereof. It shall have authority to cancel the Charter of said City, and remit its inhabitants to another form of government if necessary. In any such new form of government no salary shall exceed $3,500.

Art. 255. The General Assembly shall pass necessary laws to prevent sailors or others of the crew of foreign vessels from working on the wharves and levees of the City of New Orleans; provided, there is no treaty between the United States and foreign powers to the contrary.

Art. 57. The General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any parish or municipal corporation therein; provided, the heirs to confiscated property may be released of all taxes due thereon at the date of its reversion to them.

Art. 45. The General Assembly shall have no power to grant, or to authorize any parish or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, nor pay, nor authorize the payment, of any claim against the State, or any parish or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void.

[EXHIBIT G.]

EXTRACT FROM ACT NO. 20 OF THE ACTS OF 1882.
[Being the Present City Charter of New Orleans.]

SEC. 7. The Council shall have power and it shall be their duty, to pass such ordinances and to see to their faithful execution as may be necessary and proper: (1) To preserve the peace and good order of the city. (2) To maintain its cleanliness and health, and to this end: (*a*) to adopt and provide an efficient system of drainage; (*b*) to provide for the inspection and cleanliness of all vaults, privies, yards, pools, markets, cemeteries; (*c*) to regulate the location of and inspection and cleansing of dairies, stables, cattle yards, landings and pens, slaughter houses, soap, glue, tallow, and leather factories, depositories for hides, and all places or business likely to be or become detrimental to health, and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health, and to prevent the spread of disease, and to maintain a good sanitary condition in the streets, public places, and buildings, and on all private premises. The Common Council shall provide for the frequent inspection of all premises by persons to be designated, either by the Common Council or by the Board of Health in the city; they shall also prescribe what water supply shall be provided by the owners of private premises and that all premises, yards, streets and alleys shall be kept in a cleanly condition; shall provide for the punishment of any violation of such ordinances or regulation, by fine or imprisonment or both; and all such fines, when recovered, shall be

paid over to the Board of Health, to assist in its maintenance; (*d*) to suppress all nuisances; (*e*) to prevent the sale of adulterated or decayed food, and punish the same; to punish the sale of adulterated drinks. (3) To open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks. (4) To keep the street and crossings, and bridges, and canals and ditches, clean and in repair. (5) To organize and provide an efficient police. (6) To light the streets, wharves, landings and public squares. (7) To organize and maintain free public schools. (8) To provide for the extinguishing of fires. (9) To maintain levees, dykes, and to protect the city from overflow.

[EXHIBIT H.]

No. 9,007.

EXTRACT FROM 34TH ANNUAL REPORTS, P. 432.

CITY OF NEW ORLEANS VS. THE NEW ORLEANS WATER WORKS COMPANY.

The exemption from taxation of defendant's property by its Charter, passed in 1877, is unconstitutional, and the City's demand for taxes is sustained.

To the extent that the exemption was the consideration of defendant's obligation to supply free water to the City, defendant is entitled to relief.

The exemption was not the sole, but only part of the consideration of the obligation to supply free water.

This partial failure of consideration entitles defendant to relief to the precise extent thereof, which is accomplished by condemning the City to pay for its water to the value of the taxes recovered.

Appeal from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Chas. F. Buck, City Attorney, and *Wynne Rogers* for plaintiff and appellant.

Albert Voorhies, Thomas J. Semmes, Henry B. Kelly, Blanc & Butler, and *Breaux & Hall, contra.*

The opinion of the Court was delivered by

FENNER, J. The Act of the General Assembly, No. 33 of 1877, is the charter of the defendant company, and is entitled "An Act *to enable the City of New Orleans to promote the public health and to afford greater security*

against fire, by the establishment of a corporation to be called the New Orleans Water Works Company," etc.

The act provides for the transfer from the City of New Orleans to the company of "the water works and all the property appurtenant thereto," then belonging to said city.

It confers upon the defendant sundry valuable privileges, amongst others, "*that it shall have for fifty years the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits,*" *etc., and to charge therefor.*

The eleventh section of the Act, which is directly responsive to the purpose declared in the title, provides:

"That the City of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets, and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river, the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; *and in consideration thereof the franchises and property of said New Orleans Water Works Company, used in accordance with this Act, shall be exempt from taxation—State, municipal, and parochial.*"

By an amendment of the Act, the exemption from State taxation was repealed.

The City of New Orleans brought the present suit to recover $11,484.87, amount of taxes levied on the defendant's property for the year 1881.

Defendant, in its answer, pleads, in bar of plaintiff's action, the exemption granted by the foregoing Act; and then, reconvening, demands that in case the plea of exemption should be overruled, the city should be condemned to pay the value of the water used during the year for which the tax was levied.

Judgment was rendered in favor of the city for the tax claimed and in favor of reconvenor against the city for the value of the water, viz.: the sum of forty thousand two hundred and eighty-one dollars and eighty-seven cents.

The correctness of the judgment for the tax does not admit of question.

The courts organized under the Constitution of 1868 repeatedly decided that neither municipal authorities nor the State Legislature could validly exempt property from taxation, either by commutation of such taxes, or in any other manner, unless the property was "actually used for church, school, or charitable purposes." See, specially: City vs. Lafayette Insurance Company, 28 An. 756; Louisiana Cotton Manufacturing Company vs. City, 31 An. 440; City vs. Louisiana Savings Bank, *Id.* 827; also, 27 An. 376, 646, 648; 28 An. 498, 512; 31. 292, 637, 519,

This jurisprudence has been followed by this Court, as at present organized. State vs. Louisiana Savings Bank, 32 An. 1137; City vs. New Orleans Sugar Shed Company, 35 An. 549.

To the extent that this subjection to taxation destroys or impairs the consideration upon which rests the contract of defendant to supply free water to the city, defendant is undoubtedly entitled to relief, but to that extent only.

The position of defendant, impliedly though not expressly approved by the judge *a quo*, is that the exemption from taxation was the *sole* consideration of the defendant's obligation to furnish the city with free water, and that when the city elected to claim its taxes it released the defendant

from its entire obligation to furnish water free and became bound to pay for all the water used, even though exceeding, as it does, three fold the taxes.

Such is not our view.

While the free water supply is declared by the Act to be the consideration, and doubtless the sole consideration, of the exemption from taxes, the Act does not declare, nor do we think it means, that the exemption is the sole consideration of the obligation to supply the water to the city. On the contrary, we consider that the latter is a principal and fundamental provision of the contract, the consideration of which is found not only in the exemption, but in all the valuable privileges conferred by the Act.

This is so clear to our minds from the reading of the entire Act, and from the nature and purposes of the stipulation, as indicated by the title, that we deem it unnecessary to elaborate our reasons. The result is, that defendant has suffered, not a total, but only a partial failure of the consideration of its contract and is entitled to relief only *pro tanto*.

The principle governing the relief is well expressed by Mr. Parsons: "Where the consideration fails only in part, principles analogous to those which govern an inquiry into the adequacy of a consideration would be applied to it. If there were a substantial consideration left, although much diminished, it would still suffice to sustain the contract. * * * If the consideration and the agreement founded upon it both consisted of several parts and a part of the consideration failed, and the appropriate part of the agreement could be apportioned to it, then they might be treated as several contracts, and a recovery of money paid be had accordingly."

1 Parsons' Contracts 462.

Franklin vs. Miller, 4 A. and E. 605.

Roberts vs. Havelock, 3 B. and Ad. 404.

There could not be a clearer case for the application of these principles than this.

Defendant's obligation to furnish water to the city is unrestricted as to amount, and it appears that the city has actually used and the defendant has furnished water to the value of more than forty thousand dollars. *The extent to which the consideration has failed is exactly the amount of the city's claim for taxes.* If the city shall be condemned to pay defendant for that amount of water, exact justice will be done and defendant can claim no more.

But for the nature of the city's claim being for taxes, compensation would preserve the exact *status quo.*

We regret that the city's financial condition prevents the judgment against her from being the immediate equivalent, but the law regards interest as the only compensation for the delay which defendant may suffer in the collection of its judgment.

We observe that in the sugar shed case we allowed the defendant a judgment in reconvention for an amount slightly exceeding the city's claim for taxes. It may be that, in that case, the exemption was the sole consideration of the *bonus;* but in any event, the difference between the two claims was so slight that the view now presented did not attract our attention. City vs. New Orleans Sugar Shed Company, 35 An. 549.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the principal of the amount allowed defendant on its reconventional demand from $40,281.87 to $11,484.87; and that, as thus amended, the same be now affirmed, defendant to pay cost of this appeal.

[The italics are by the present editor.]

Supreme Court of the United States.

No. 1525.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

THE NEW ORLEANS WATERWORKS COMPANY AND E. CONERY, JR., ET ALS., DEFENDANTS IN ERROR,

AND

E. CONERY, JR., ET ALS., PLAINTIFFS IN ERROR,

versus No.

THE NEW ORLEANS WATERWORKS COMPANY AND THE CITY OF NEW ORLEANS, DEFENDANTS IN ERROR.

WRITS OF ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief on Motion to Dismiss or Affirm.

J. R. BECKWITH,
H. H. HALL,
GUS. A. BREAUX,
Counsel for New Orleans Waterworks Company.

A. W. Hyatt, Printer and Stationer, 73 Camp st., N. O.—47870

NOTICE OF MOTION.

The city of New Orleans, plaintiff in error, will please take notice that on Monday, the ~~first~~ tenth day of January A. D., 1890, or on the first day thereafter, when the United States Supreme Court shall be in session and will hear counsel in that behalf, the New Orleans Waterworks Company by its counsel will move that court as set forth in the annexed printed motion, and will at the same time submit to the court the annexed printed brief and argument in support of said motion.

J. R. BECKWITH,
H. H. HALL,
GUS. A BREAUX,
Counsel for New Orleans Waterworks Co.

New Orleans, December, 1889.

Supreme Court of the United States.

No.

THE OCTOBER TERM, A.D. 1889.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

THE NEW ORLEANS WATERWORKS COMPANY AND E. CONERY, ET ALS., DEFENDANT IN ERROR.

Error to the Supreme Court of the State of Lousiana.

MOTION TO DISMISS OR AFFIRM.

And now comes the New Orleans Waterworks Company, made defendant in error in the writ of error sued out herein, and moves the court that the writ of error herein be dismissed, for the reason, amongst others, that the record herein does not show that this court has jurisdiction to review or revise the decree of the Supreme Court of the State of Louisiana herein, to which the said writ of error is directed and addressed, and because the plaintiff in error, the city of New Orleans, cannot lawfully prosecute the writ in manner and form as granted and allowed.

And as authorized by rule 6 of the rules of this court the said New Orleans Waterworks Company joins with said motion to dismiss said writ of error, a motion that in the event the court shall deem that the record may or does ~~not~~ show that the court

has jurisdiction, that the court affirm the decree of the Supreme Court of the State of Louisiana herein, because it is manifest that the writ of error herein was taken for delay, and that the question upon which the jurisdiction of this court depends is so frivolous as not to call for or need further argument. And so moves this honorable court.

J. R. BECKWITH,
H. H. HALL,
GUS. A. BREAUX,

Counsel for New Orleans Waterworks Company.

Supreme Court of the United States.

No.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

THE NEW ORLEANS WATERWORKS COMPANY AND E. CONERY, JR., ET ALS, DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief on Motion to Dismiss or Affirm.

This is a curiosity—a writ of error sued out by a single defendant against a co-defendant and common plaintiff, complaining of a decree sustaining and giving effect to the original plea and defence pleaded by the present plaintiff in error against the demand of the original plaintiff.

STATEMENT OF FACTS AND PLEADINGS.

This action was instituted in the Civil District Court for the parish of Orleans by E. Conery and a score of other persons claiming to be taxpayers, paying taxes to the city of New Orleans. They made the city of New Orleans and this defendant in error

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[NOTE.—At the time of preparing this brief the record is being printed and we are unable to give page reference to the printed transcript.]

defendants in their action, alleging that the city officials refused or neglected to do their duty as excuse for instituting the suit as taxpayers and for making the city defendant, in order that the city might be compelled by the courts to do what these patriotic taxpayers construed to be its political and administrative duty.

The petition of the taxpayers, in substance, alleges that by the terms and authority of acts of the legislature of the state, adopted in 1877 and 1878, the city of New Orleans sold its public waterworks to the New Orleans Waterworks Company for a valuable consideration, for the term of fifty years, the state giving the vendee a certain monopoly of public water supply. This grant has been repeatedly before this court, notably in the case of the St. Tammany Waterworks Company vs. the New Orleans Waterworks Company, *120 U. S. 64*, and in *New Orleans Waterworks Company vs. Rivers, 115 U. S. 674*.

They allege that the 11th section of the charter of the waterworks company is a covenant for public water supply. The section is in the following words:

Sec. 11. *Be it further enacted, etc.*, That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company, now laid or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions; and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purposes; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; *and in consideration thereof the franchises and property of said New Orleans Waterworks Company, used in accordance with this act, shall be exempted from taxation—state, municipal and parochial.*

Act No. 33, extra session, 1877, pages 51–53.

This section was subsequently amended by act No. 43 of the

acts of 1878 (session laws, 1878, page 70) by striking out the word "state" from the exemption from taxation, leaving the covenant of exemption to include municipal and parochial taxation only.

The petition alleges that at the time of the purchase of the waterworks in 1878 it was the settled construction of the state constitution then in force that the legislature could not exempt property of this character from municipal or parochial taxation, and that the Waterworks Company knew or ought to have known this to be the law, hence took nothing by the covenant; that while the covenant to furnish free water was binding on the company, the covenant to exempt the property from municipal taxation was not binding on the city. The result claimed is that the city had free public water supply for nothing in return.

That the city assessed the property of the company and levied a municipal tax; the company refused to pay, claiming exemption; the city sued for the tax in the state courts; the company defended, claiming exemption by law, but interposed an alternative demand for full value of public water supply in the event that it should be held by the courts that there was no exemption from taxation; that this cause went through the courts until it was determined by the Supreme Court of the state in 1884, as reported in the case of *The City of New Orleans vs. the New Orleans Waterworks Company, 36 Louisiana Annual Reports, page 432;* the court deciding that the legislature had no power to make the exemption; that the exemption was but a *part* of the consideration for free water supply; that the company must pay the tax assessed, but could have judgment back for a sum equal to the tax paid; the tax to be paid into the treasury, the judgment back to be a judgment as in case of a common, unsecured debt, due from a municipal corporation that could not be compelled to pay the judgment, there being no compulsory process to compel satisfaction of judgment against the city of New Orleans.

The petitioners also alleged that, although this contro-

versy was confined to the tax of one year (1881) the Supreme Court had intervened as a contracting party, and by its decree had made a *new contract* for the waterworks company without its consent; that the contract as made by the Supreme Court was free water supply for the city, with no exemption from taxation, the city to compel the payment of taxes and submit to an unenforceable judgment back for a like amount.

That the waterworks company ought to have been contented with this extraordinary result, but was not contented.

That the company applied to the legislature for relief, and, as the petition implies, seduced the legislature into honest action, resulting in the adoption of act No. 56 of the acts of 1884 (*session laws of 1884, page 78*). This act is printed *in extenso* as "Appendix A." It enacted that in all cases of taxation of the property of the Waterworks Company, whether in the past or in the future, and the company was compelled to pay notwithstanding the exemption granted in section 11 of its charter, the city should be compelled to pay the company the full value of all water supplied during the year or years covered by the tax collected; and compelled the city in the event it elected to enforce the tax to provide and set apart in its annual budget a sum equal to the value of the water to be supplied during the year, providing that unless this was done the company could not be compelled to furnish public water supply for the year for which the city had not provided. This action would seem to have been honest. If the city did not elect to levy the tax the relation between the parties was undisturbed; if it did elect to levy the tax then it must pay for public water supply and make provision in its budget for the payment by consigning a part of its revenues for that purpose.

The act in no way modified the charter of the Waterworks Company, but did operate on the city. If the city did not elect to give the act effect by insisting on a tax, the act, as far the future was concerned, was inert; if it did elect to tax, then the act operated

a control over the city as a legislative modification of its charter in its dealings with the Waterworks Company.

The petition assails act 56, charging it with all imaginable vices: It was in violation of the constitution of 1879; the title was bad; the act was double; it sought to relieve a contractor of his obligations to a municipal corporation; it sought to set aside or modify the Supreme Court contract; it was promoted by the Waterworks Company, was a modification of its charter, and deprived that company of its monopoly grant and rights, although what the taxpayers had to do with that matter, if true, is not clear; in fact it was as full of vices as the volunteer taxpayers were full of virtues and patriotism, which, in their estimation, was apparently the superlative.

The petition further alleges in substance that, seduced by the Waterworks Company, the city elected to impose and collect the tax in the future, and adopted ordinance No. 909 of the current series; that the city entered into a contract for public water supply under the terms of this ordinance. The contract embodies the ordinance 909 and is printed *in extenso* as "Appendix B," annexed to this brief.

The city elected in this contract to assess and collect the tax in disregard of section 11 of the charter of the company, and pay for public water supply. The rate of payment was fixed at $60 per hydrant. Increased supply in time of drouth and increased pressure were provided for. The minimum number of hydrants on the streets was fixed, with a covenant to make provision for payment in the annual budget, with discount for prompt payment, and time fixed when this contract should go into effect.

Although the city had full power to do this under its general charter powers it is charged in the petition that this contract was entered into under and depended for its validity on act 56 of 1884. The act was void, they alleged, and therefore the contract fell with it. The contract was indiscreet—a bad bargain, in their opinion, and therefore

void. They did not like the contract as taxpayers; therefore it was vicious and worthless. They were true and suffering patriots; the Waterworks Company was composed of greedy schemers: therefore they must have debauched the mayor and city council: therefore the contract was void; it called for the payment of more money than the taxpayers liked to contribute. No legislative body had any right to legislate unwisely; in their opinion the state legislature and the city council had both legislated unwisely: therefore their legislation was void; and other nonsense of like character. They joined the city, most of its executive officers and the Waterworks Company; as defendants prayed an injunction to prevent the payment of any more money to the Waterworks Company; that act 56 of the acts of 1884 be declared unconstitutional and void; that ordinance 909 and the contract made under it be annulled and set aside; that the Waterworks Company be decreed to furnish free public water supply, pay all taxes imposed, and recover back a like amount if they could get judgment against the city and enforce its collection, which practically meant free public water supply for nothing in return.

The defendants were all cited in the district court. The Waterworks Company, the city and the other defendants excepted that there was no cause of action in the plaintiffs as taxpayers; the defendants pleading separately, the city and its officers for themselves, the Waterworks Company for itself.

In accordance with the jurisprudence of the state as it then existed the district court sustained the exceptions and dismissed the action. The taxpayers appealed. Pending appeal the Supreme Court reversed the jurisprudence of the state in that particular, and held that taxpayers could assail a municipal corporation; therefore when this appeal was reached the court reversed the judgment of the lower court and sent the case back for trial on its merits, if it had any.

On remand to the lower court defendants were required

to plead. The city, acting for itself through the city attorney, appeared and in a general denial formally pleaded; denied all of the charges of fraud and all of the vices charged against the city, the city council, the state legislature, ordinance 909 and the contract under it, and prayed judgment *against the taxpayer plaintiffs.*

This pleading under the laws of Louisiana was a judicial confession of the most solemn form, affirming the validity of the contract with the Waterworks Company, in which that company had a vested right, as its effect was to affirm the validity of the contract, and would have made it good if it had been voidable only. *This plea has never been withdrawn, but still stands as the plea of the city in vindication of ordinance 909 and the contract assailed by the taxpaying plaintiffs.*

The Waterworks Company also appeared and excepted that there was no cause of action disclosed in the petition as pleaded. This exception was tried and partially overruled, partly referred to the merits, when the Waterworks Company answered exhaustively, putting at issue all of the facts and alleged law crammed into the petition. The case stood at issue over one term without trial. Meanwhile the term of office of the city government that had adopted the ordinance and made the contract expired, and a so-called "reform city government" was elected. The result of this election was a change of city officers, representatives of reform and repeal. These militant and military reformers came to the administration of the city, as "the reform government," a city government militant. To be consistent warlike deeds must be done.

They did not delay long in turning their artillery on the Waterworks Company.

By some kind of an ordinance they directed the city attorney to *intervene for the city* in this suit and demand the annulment of ordinance 909 and the contract assailed by the taxpayers. Nothing could better illustrate their confusion of ideas. The city attorney was ordered to *intervene and bring the city into a suit in which*

the city was already in full length as a defendant who had been charged with all kinds of frauds and vices, and had in the most solemn form denied all the matters charged against it and affirmed the validity of the contract by formal judicial confession. Some of the taxpaying plaintiffs had secured election to the city council and had thereby reinforced their original position as plaintiffs. This new vantage ground was used with a vengeance.

Counsel for the Waterworks Company naturally supposed that the city attorney would apply to the court for leave to withdraw the original plea of the city, and were prepared to resist the application. This course did not seem necessary to the city attorney. Permitting the original plea, denying all vice, fraud or illegality in the contract, to stand undisturbed, he filed a nondescript paper, called by him "an amended and supplemental answer," in which he set up nearly all of the stuff and trash compressed into the taxpayers' petition against the city, the truth of which the city stood on the record denying by its formal plea demanding judgment against the taxpayers for costs, because these statements were untrue; and on the supposition that a municipal corporation, the creature of legislative will, to which life can be given and taken away at will, was a corporation protected by the construction given the federal constitution in the Dartmouth College case, the city attorney set up that the city, in virtue of the 11th section of the waterworks' charter *and the construction given that section* by the state Supreme Court in the waterworks tax case in the 36 Annual Reports, had become the beneficiary of a contract, part law, part an erroneous decision of a court; that this composite creation was a vested right in the city protected by the federal constitution; that act 56 of 1884 (which, but for the action of the city council, would have remained forever inoperative) in some way deprived the city of this unfair advantage or alleged contract: therefore, act 56 was, in his opinion, repugnant to the federal constitution and void. That, as the act was void, his logic led him to the conclusion that ordinance 909

and the contract under it were also void, as repugnant to the first article of the federal constitution; and although both the ordinance and the contract were the acts of the city somehow both ought to go down.

This, so far as we can see, was the sole attempt to raise a federal question on the part of either the taxpayer plaintiffs or their late recruit, this deserter from our side of the controversy.

Leave to file this paper was granted *ex parte*, and the waterworks cited to answer. The company, desiring to get a speedy trial, answered this document as cited, excepting that the city could not change front on its own contract in the manner attempted; that the first plea of the city affirming the contract cut the city off from the double dealing evidenced by the new attitude of the city, and took issue of fact and law on all matters set up in the pretended pleading.

When the cause came on for trial the Waterworks Company and the taxpayer plaintiffs objected to any proof in support of the pretended amended and supplemental answer of the city while the plea of general denial remained of record as the original defence of the city against the common plaintiff and antagonist of both defendants; that in so far as the new pleadings assailed act 56 that act was valid, and if invalid the city had competent power to make the contract under the provisions of its charter compelling it to provide for the extinguishment of fires and for the public health *without* act 56; and if that act *was* declared invalid the contract did not fall with it, being warranted by other statutes and by the law of the land.

The lower court ruled out all evidence offered by the city in support of them as defendants as inconsistent with the former plea of the city, but rendered judgment against both defendants, declaring act 56 and the contract void; granted an injunction against the city and the Waterworks Company, inhibiting them from giving any force or effect to the contract assailed, and from paying or demanding any money or payment under the contract, or setting it up in any form.

The city never appealed from the decision of the lower court rejecting all this evidence, and that judgment and ruling of the lower court became final and was acquiesced in by the city. The judgment in favor of the taxpayers, by which the contract was destroyed, was satisfactory to the city, with its new, reform notions of integrity, after its first denial of any vice or illegality in the contract; and as defendant it did not appeal from any part of the decree.

The Waterworks Company, *one* of the defendants, *alone* appealed from the decree adverse to itself. The city attorney never appealed or attempted to bring up any of the matters in his "intervention" for the consideration of the supreme court, nor the ruling by which his new answer was thrown out of the lower court, for reversal or review; consequently the decree rejecting evidence under his "intervention" stands as the ruling of the lower court, unappealed from and unreversed as the decree of a court, not the court of highest resort in the state in that case.

The case came on for trial in the Supreme Court on *the appeal of the Waterworks Company alone.* That court, by a majority of the bench, reversed the decree of the lower court, dissolved the injunction and dismissed the case for the want of equity or lawful cause of action, placing their judgment and decision on the ground that act 56 was not repugnant to the state constitution; that the city without that act had authority to make the contract; that whether the city should make the contract or not, whether it should pay for water, and how much water it should take, how it should be distributed or provided for, were all matters of legislative discretion, vested in the city council, political in character; therefore, in the absence of fraud, such as would vitiate legislation, could not be reviewed by the courts, any more than any other political action of a municipal corporation acting *within the limit of its powers;* that there was no fraud proved or *ultra vires* shown, therefore nothing to sustain the decree appealed from.

This was all that it was necessary for the court to determine to decree against the plaintiffs, and even if the city had appealed from the decree, practically dismissing its new and penitent answer, and the matters therein set up had been before the court, there was no occasion to determine anything in relation to act 56 from the moment the court determined that act 56 was immaterial, as the contract was valid without it.

It is true that there was a dissenting opinion by Justice Fenner and dissent by Chief Justice Bermudez, yet if the dissenting opinions could be consulted in aid of the writ of error nothing can be found there to sustain the writ, even if it was possible for a municipal corporation to complain of legislation affecting its charter powers, where no interest had vested in third persons, in which case the third persons injured are the only persons who can complain and invoke the federal constitution.

After a furious assault on the court by the taxpayers plaintiffs for a rehearing, the Supreme Court granted counsel until September, 1889, to file a brief in support of the petition. This they failed to do, and at the present (November) term of the State Supreme Court rehearing was refused, and the decree became final. On the next day the dissenting chief justice allowed the writ of error complained of, not to the taxpayers, plaintiffs in the lower court and defendants in appeal, but to *the city of New Orleans, a co defendant with the Waterworks Company*, complaining of a judgment confirming its *its own act and contract*, sustaining the defence by which it first met the suit of the taxpayers. To this writ the Waterworks Company *and* the taxpayers are made parties defendant. The other city officers, comptroller, etc., original defendants in the suit, are left out without even mention in the writ or in any recital.

The writ is manifestly fatally defective beyond amendment by reason of defects apparent on its face and on the face of the record; but the want of jurisdiction of this court to grant the writ or review the decree is so apparent that it is of little interest to

consider the vices of the writ itself. The writ is allowed to operate a supersedeas on a bond of $500, although what there is to supersede, as far as the city is concerned, is not apparent. The judgment for costs even is in its favor. The writ certainly does not revive the decree of the lower state court where it was instituted.

ARGUMENT.

There was no federal question giving this court jurisdiction in writ of error to a state court either raised in or decided by the Supreme Court of Louisiana. The plaintiff in error being a municipal corporation, strictly political in character, can acquire no vested rights as a corporation in or by its charter. The legislature creating a municipal corporation can create and destroy at will, unless restrained by the state constitution. This was declared and settled in the case of *Mount Pleasant vs Beckwith, 100 U. S. 514; Barnes vs. District of Columbia, 91 U. S. 540*; *Laramie County vs. Albany County*, 92 U. S. 307.

In this case Justice Clifford, the organ of the court, held "that it is the settled doctrine that municipal corporations are under the entire control of the legislature from which their powers are derived; that their duties are all public and at all times subject to the will of the legislature, "and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because, there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact." 92 U. S. 310.

* * * "Institutions of the kind called counties and towns are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretense to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are incompatible with everything of the nature of compact. 92 U. S. 311.

This is the settled doctrine of all the states. The plaintiff in error complains that some contract between the city of New Orleans and the State of Louisiana, embodied in its charter grant of political

power, has been impaired by act 56 of 1884. If that act was anything more than a bare enabling act it would be simply a modification of the city charter, which is not and never was a contract—simply a license to administer some of the political affairs of a locality which the state has temporarily surrendered to a political corporation, subject to such modification or recall as the state legislature may see fit to make at its will as to extent, time or manner, independent of any federal authority or right of control.

The pretense that the city of New Orleans, as a political corporation, has any contract with the state that can be impaired by the action of the state legislature is so absurd as to be amusing. It has no contract of any kind whatever with the state of Louisiana. The legislature has full power to legislate the entire corporation out of existence to-morrow, in so far as any right vested in the corporation itself is concerned.

There can be no contract between a state and a municipal corporation concerning the political management and control of *public affairs for the public*.

Even if the city charter of New Orleans was a civil contract with the state, act No. 56 of 1884 in no manner interferes with that contract, or with the supposed contract made by the Supreme Court of Louisiana in the tax case in the 36th Annual Reports. By the terms of act 56 if the city does not impose a municipal tax on the property of the New Orleans Waterworks, and attempt to collect it, the situation is to remain unchanged; viz: free public water supply and no taxation—but if the city undertakes to collect the tax, then the legislature defines the terms under which it can levy the tax. It is a public law relating to public matters and affairs. In ordinance 909 the city elected to levy the tax. It is ordinance 909 that led to the contract for water supply. That ordinance is the act of the city, not of the state. If the city by its own act has impaired the faith of its own contract, to its own injury, it has nothing to charge against the state, nor has its right been impaired by the state in any form. Ordinance 907

does not by its adoption or operation raise a ghost of a federal question for review in this court.

Section 709 of the federal revised statutes sets out the only cases where there is a review of the decrees of a State court on writ of error. There are only three classes provided for: First, where the validity of a treaty or statute of the United States or an authority exercised under the federal government is drawn in question, and the judgment is against the validity of the right or statute set up. Second, where the validity of a state statute or any authority exercised under any state, and the validity or authority so set up is drawn in question as repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of validity. Third, where right, title, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the right, title, authority or immunity set up.

The decision sought to be reversed must be the decision of the court of highest resort in the state to which that case could have been carried on appeal or error. If the city of New Orleans has any complaint of error to its prejudice it is that the district court, the court of first instance, refused to entertain its so-called "amended and supplemental answer." From this ruling the state law gave the city the right of appeal to the Supreme Court. This right was never exercised. The defendant alone appealed from the decree against itself in favor of the demand of the taxpayers.

But if this objection is overlooked or disregarded the case of the city of New Orleans does not fall under either of the three classes provided for in that section.

There can be no pretense that the case falls under either the first or third classes named in section 709.

It seems impossible for a political, municipal corporation to raise a federal question under the second class, for which provision for review is made, in any question of the extent of political

power or limitation of power in the act of state legislation creating the political corporation or defining its powers in public administration of public affairs.

The action of the legislature in making the corporation is political and public entirely, and devoid of any suspicion of compact or contract between the state and the local corporation created for the sole purpose of government at the situs of the corporation; yet the entire burden of the complaint of the mayor in his verbose petition for a writ of error, is that there has been the impairment of the obligation of a contract somewhere and by somebody, precisely by whom is not made certain.

The effort is to invoke article 1 of the federal constitution. To invoke that article by reason of the prohibition laid on states concerning impairment of obligations or faith of contracts it is indispensable for the plaintiff in error to show impairment of a contract, created by convention or by operation of law, binding as a contract; and the impairment must be by the state.

If it be conceded that the plaintiff in error is here by any lawful right; that it stands in the place of the taxpaying plaintiffs and had sued out this writ for them, it is clear that as far as power to meddle with the administration of city affairs both can stand only as representing the political corporation they assume to champion or represent, and must stand on the same rights and powers as plaintiffs in error, and make the same showing of right to review.

The burden of their suit and its sole object is to have city ordinance 909 and the contract under it annulled. The adoption of ordinance 909 and the contract under it are not the acts or legislation of the state. They are both *the voluntary acts of the plaintiff in error*. If either the ordinance or the contract impair or alter any preëxisting contract relation between the plaintiff and defendant in error, the result came to the city by its own act, acting politically and within the sphere of its legitimate political and ad-

ministrative powers. This act cannot in a moment of repentance be unloaded on the state to bring the case within the second class of cases provided for in section 709, Revised Statutes. The state was no party to the contract, for it was the voluntary act of the plaintiff in error, and can involve no federal question.

What is alleged against the contract? 1st, that it is *ultra vires*. This is not a federal question. The court determined that it is not *ultra vires* and ended that controversy by a simple construction of a state statute—the city charter.

2d, that there was combination and conspiracy between the city of New Orleans and the Waterworks Company to procure the adoption of the ordinance 909 and the contract. This was a simple question of fact. The court found the fact against the party setting it up. That was the end of a controversy of fact without the slightest gleam of federal question involved.

3d, that the contract was indiscreet, an unprofitable convention. If this had been a possible ground for recalling the contract it was also a naked question of fact. The court decided that the action of the city in adopting the ordinance and making the contract was political in character, and could not be reviewed by the court on the question of its policy or impolicy. No federal question there.

4th, that the city, under its charter, was without authority to adopt ordinance 909 or make the contract; that the only pretended authority came from act 56 of the acts of 1884; that this act was unintelligently construed by the city of New Orleans, and assumed to give authority to make the contract, when in fact wise and intelligent men would have come to a contrary conclusion and refused to make the contract; but if the act really did on its face authorize the contract, then the act was void for repugnance to articles 45, 57, 234 and 461 of the *state constitution.*

The State Supreme Court certainly had authority to construe the laws and constitution of its own State, and determined, not only that act 56 was free from the vices alleged against it and was

valid legislation, but further, that if it had been invalid such invalidity would not have affected the contract assailed, for the reason that under their construction of the charter powers of the city there was full power to make the contract without act 56. That was the end of the contention concerning act 56 of 1884. The only act having any relation to the contract assailed that is charged to have been the act of the State was the adoption of act 56. The State Supreme Court determined that act 56 did not operate to make any contract or affect the validity of any contract. There is nothing, therefore, in that feature of this assault on the contract bringing the case into either of the classes reviewable under the terms of the federal judiciary act.

5th. The contract was assailed on the ground of general and undefined, undescribed frauds by everybody. The court found as a fact that there was no proof sustaining this charge—a naked issue of fact found against the pleader, not reviewable here or elsewhere.

The Supreme Court of the state certainly found enough o simple and entirely local law to determine the case as it did determine it without dealing with any federal question, and if there had, by any chance, been a federal question in the case the court would have determined the case against the plaintiff in error or the plaintiff below long before the federal question could have been reached. Therefore, if it is possible for a political corporation to raise a question of bad faith in the alleged compact by which it was given existence by the state, and could litigate the question *with the state*, it was not necessary in this case for the court to decide that question, as it could and did dispose of the case on other grounds.

To give this court jurisdiction to review the judgment of a state court, under section 907, it must appear that the title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way.

Chappell vs. Bradshaw, 128 U. S. 132.

Spies vs. Illinois, 123 U. S. 131–181.

In error to a state court this court acts only on the record. It is essential that the record not only show that the right, immunity, etc., was set up or claimed in the court below, but that the decision of the court was against the right set up or claimed in the petition. The petition for writ of error forms no part of the record.

Clark vs. Pennsylvania, 128 U. S. 395.

Warfield vs. Chaffe, 91 U. S. 690.

Susquehanna Boom Co. vs. West Branch Boom Co., 110 U. S. 57.

"It is a well-settled rule limiting the jurisdiction of this court in such cases that where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did in fact base its judgment on such independent ground and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.

"And it must appear affirmatively not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not be given without deciding it."

Klinger vs. Missouri, 13 Wall. 257–263.

De Saussure vs. Gaillard, 127 U. S. 216–233.

Brown vs. Atwell, 92 U. S. 327.

Citizens' Bank vs. Board of Liquidation, 98 U. S. 140.

Chouteau vs. Gibson, 111 U. S. 200.

Adams Co. vs. Railroad, 112 U. S. 123.

Detroit City R. R. vs. Guthard, 114 U. S. 133.

New Orleans Waterworks Co. vs. La. Sugar Refinery Co., 125 U. S. 18.

Kreiger vs. R. R. Co., 125 U. S. 39.

Lehigh Water Co. vs. Euston, 121 U. S. 388.

We respectfully submit that if the writ of error in this cause

was not fatally defective for reasons apparent on its face, and for want of summons and severance it confers on this court no jurisdiction to review the judgment of the State Supreme Court. All of the questions determined by the state court in reaching its decree are purely local matters of internal interest to the state as far as they are questions of law, exclusively questions of the construction of state statutes in their relation to the local public powers and authority of a local political corporation created by the state and in all things subordinate to its authority, and dependent upon the state statutes for existence and span of life.

That not only was there no federal question raised or decided, but there existed no necessity for the decision of any federal question to determine the cause as it has been determined.

That it was in the nature of things impossible for the city of New Orleans to set up the impairment of any obligation of contract by the state in directing or defining its corporate powers and rights, for not a single corporate right or franchise held by it as a political corporation came to it by contract, either in form or substance, but all came by *public laws*.

That with the broadest construction of act 56 of the acts of 1884 most favorable to the pretensions of the plaintiff in error, it was simply an act to direct and regulate the levy of municipal taxes for a local public political purpose, with which federal authority has no interest or right to interfere. If repugnant to the state constitution the state courts were the proper tribunals to determine its validity as public law.

That the act itself is simply a direction by the political power of the state to its temporary political agent in a locality in the state that in the event it levies taxes on property of the Waterworks Company it must make provision to pay for public water supply; if it does not levy the tax, but respects section 11 of the waterworks' charter, in that case the situation is to remain unchanged.

The effect that will be given by the plaintiff in error to this quondam writ, with its order for supersedeas on a $500 bond, will be to put us at the mercy of a dilatory creditor of doubtful capacity to pay its debts. Not one dollar has been paid under the contract since the decree of the district court. The city demands and receives its public water supply, and will demand it pending this writ. An entire community ought not be punished for the errors, unfairness or inefficiency of its representatives; therefore, without calamity to the innocent, the defendant in error cannot well cut off the public water supply, but must continue that supply, yet if it does not cut off, it must continue to supply on the doubtful credit of a practically insolvent corporation, with nothing to recommend its methods or foster faith in ultimate payment. Over fifty thousand dollars is now due, and indebtedness will accumulate at the rate of sixty ($60) dollars per hydrant per annum while the city can avail itself of this wretched writ as excuse for non-action in the way of the legislative appropriation necessary to authorize payment of the debt.

We respectfully ask that the writ of error may be dismissed, or, if this court can find in the record any gleam of jurisdiction, the judgment of the lower court be affirmed.

Respectfully submitted.

J. R. BECKWITH,
GUS. A. BREAUX,
H. H. HALL,

Counsel for New Orleans Waterworks Company, cited as Defendants in Error.

Supreme Court of the United States.

No.

THE OCTOBER TERM, A.D. 1889.

E. CONERY, JR., ET AL., PLAINTIFFS IN ERROR,

versus

THE NEW ORLEANS WATERWORKS COMPANY AND THE CITY OF NEW ORLEANS, DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Louisiana.

MOTION TO DISMISS OR AFFIRM.

And now comes the New Orleans Waterworks Company, made defendant in error in the writ of error sued out herein, and moves the court that the writ of error herein be dismissed, for the reason, amongst others, that the record herein does not show that this court has jurisdiction to review or revise the decree of the Supreme Court of the State of Louisiana herein, to which the said writ of error is directed and addressed, and because the plaintiffs in error, the said taxpayers cannot lawfully prosecute the writ in manner and form as granted and allowed.

And as authorized by rule 6 of the rules of this court the said New Orleans Waterworks Company joins with said motion

to dismiss said writ of error, a motion that in the event the court shall deem that the record may or does show that the court has jurisdiction, that the court affirm the decree of the Supreme Court of the State of Louisiana herein, because it manifest that the writ of error herein was taken for delay, and that the question upon which the jurisdiction of this court depends is so frivolous as not to call for or need further argument. And so moves this honorable court.

J. R. BECKWITH,
H. H. HALL,
GUS. A. BREAUX,
Counsel for New Orleans Waterworks Company.

NOTICE.

E. Conery et al. and E. D. Farrar, Esq., counsel for said plaintiff in error, will please take notice that on Thursday the 10th day of January, A. D. 1889, or on the first day thereafter, when the United States Supreme Court shall be in session, and will hear counsel in that behalf, the New Orleans Waterworks Company, defendant in error, by its counsel, will move that court as set forth in the preceding printed motion, and will at the same time submit to the court the annexed printed brief and the brief in the case of the City of New Orleans, plaintiff in error, vs. the New Orleans Waterworks Company et al., defendants. the first writ of error sued out and lodged in the record to revise or reverse the decree in this cause, also annexed to this notice.

J. R. BECKWITH,
H. H. HALL,
GUS. A. BREAUX.

Counsel for New Orleans Waterworks Company, Defendants in Error.

New Orleans, December ——, 1888.

BRIEF OF NEW ORLEANS WATERWORKS COMPANY, AGAIN MADE DEFENDANT IN ERROR IN WRIT OF ERROR NO. 2, SUED OUT BY E. CONERY, JR., ET AL., AGAINST THE NEW ORLEANS WATERWORKS COMPANY AND THE CITY OF NEW ORLEANS, DEFENDANTS IN ERROR.

The dissenting chief justice of the State supreme court seems determined that there shall be a regular hail-storm of writs of error in this cause, and apparently allows all writs presented for allowance.

This time it is the alleged taxpayer plaintiffs who have assailed us—upon what pretense as to federal questions determined adversely to them is not made to appear; in fact, it seems to be the opinion of the chief justice and counsel for taxpayers that a federal writ of error to a State court is only a matter of caprice, not controlled by law, but allowed always on simple demand.

We are unable to comprehend the taxpayers in any better position to obtain and lawfully prosecute a writ of error than the city of New Orleans itself when it assumed the *role* of plaintiff in error in this cause. Both the city of New Orleans and the taxpayers or their counsel seem to act in accord and in close combination to harrass this defendant in error with senseless litigation and apparently absurd writs.

In support of this, the second motion to dismiss or affirm, we submit to the court and rely on our brief in support of the motion to dismiss the writ first sued out—that is, the writ in which the city of New Orleans stands as plaintiff in error.

Onthe question of alleged impairment of contract between the city of New Orleans and the state of Louisiana, its creator,

which is said to be contained in *the public laws of Louisiana*, enacted about and concerning the *public political* affairs of the state concerning strictly internal interests and regulations, we believe that we have shown in that brief on authority that there can be no contract relation between the state legislature and a municipal corporation of its creation *in any matter relating to public affairs.*

It is alleged that counsel for E. Conery and his associate, alleged taxpayers, plaintiffs in error in *this writ*, claim a right to this writ because of alleged taking away of some property by the decree complained of "without due process of law." This assumption, if actually made, cannot be serious, and is too inffrm to discuss.

If this could have been made a question in the case, and if the alleged taxpayers could possibly have had any of *their property taken away from them in any legal sense and meaning of the phrase*, the question was never presented to the state court, never determined by the state court, nor was it necessary for the state court to deal with any such question to reach the decree rendered.

It seems unnecessary to cite authorities concerning what constitutes taking of property or deprivation of personal rights and immunities without due process of law. This court has so often declared what *is not* such taking of property or the deprivation of rights and immunities without due process of law, that every possible question of that character that could be injected into this case by the most superlative ingenuity has long been settled; besides, instead of any want of "process of law," there has been a complete epidemic of 'process of law" in all of which the New Orleans Waterworks Company has been the target from the first day of its existence until the cyclone of writs of error in this case.

It was within the power and was the duty of the state Supreme Court to construe and declare the effect and operation of its own decree in the tax case of the City of New Orleans vs. the New Orleans Waterworks Company, in the 36th Annual Reports; and in doing so it acted in due course of law, under due process of law provoked by these very taxpaying plaintiffs in error.

It is clear that the taxpayers, plaintiffs in error, can only *urge such rights as the city of New Orleans could have urged had it assailed the contract with the Waterworks Company.*

Not one single individual right of any one of the taxpayers *as an individual* is involved. By a freak in *jurisprudence*, which sooner or later must be abandoned as dangerously meddlesome, these taxpayers have been permitted to go into court *for the city of New Orleans*, to assert what they pretended to be the interests of that corporation, *for that corporation*, in a matter of political internal administration of the political affairs of the corporation, and are certainly estopped where the city they champion would be estopped. They can assert nothing against the contract assailed that the city of New Orleans could not have urged if it had attacked the contract itself.

The fourteenth amendment never was intended to apply as a regulation of the state in granting or defining the political powers and rights of political corporations governing portions of the state.

Such corporations are not, as corporations, included in any provision of the fourteenth amendment. If this was the case under any possible construction of that amendment, a city charter once granted could not be taken away or municipal powers restricted by any state legislature. This is too manifest to call for authorities. We cite, however, *Mount Pleasant vs. Beckwith, 100 U. S. 514; Laramie County vs. Albany County, 92 U. S. 307; Commissioners vs. Lucas, 93 U. S. 108.*

This writ of error should not have been allowed.

"Writs of error to state courts have never been allowed as of right."

Mitchell vs. The Commonwealth, 7 Wall. 321.

"It is the duty of him to whom an application for such a writ is made to ascertain, from an examination of the record of the state court, whether any question cognizable here on appeal was made and decided in the proper court of the state, and whether the case, on the face of the record, will justify the allowance of the writ."

Spies vs. Illinois, 123 U. S. 131–143.

A petition for rehearing in a state court after the decree complained of was made cannot be invoked to support a federal writ of error.

Parmlee vs. Lawrence, 11 Wall. 36.

If there are two questions in the case—one federal and the other not—and it appears that the cause was decided in the state court upon the question not federal in character, there is no review on error, and this court may examine the opinion of the court to determine what point was decided.

Croply vs. New Orleans, 108 *U. S.* 105.
Cousin vs. Blane, 19 *How.* 202.
Adams County vs. Burlington R. R. Co., 112 *U. S.* 123.
Murdock vs. Memphis, 20 *Wall.* 590.
Jenkins vs. Leowenthal, 110 U. S. 222.

As the act 56 of the acts of 1884 did not of itself impose an obligation of one dollar on the city of New Orleans, only provided that if the city imposed a municipal tax on the Waterworks Company contrary to the exemption contained in section 11 of that company's charter then the city must pay for public water supply; and the only contract between the city and this defendant in error of which complaint is made was a contract made *by the city* and *with the city*, it is difficult to comprehend how counsel can assert that the state has acted in inflicting

any supposed wrong on the city or on any person or corporation by the adoption of act 56 of 1884.

We have not restated the facts and record, as both are fully stated in the annexed brief in the case of the motion to dismiss the writ sued out by the city of New Orleans.

All of which is respectfully submitted.

J. R. BECKWITH,
H. H. HALL,
GUS. A. BREAUX,

Counsel for New Orleans Waterworks Company, Defendants in Error.

APPENDIX A.

No. 56.]

AN ACT

To provide for the supply of water to the city of New Orleans by the New Orleans Waterworks Company, in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Waterworks Company, and to enable the city of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company contrary to the exemption given in its charter, and to put into effect section 11 of act No. 33 of acts of 1877, E. S., in instances of refusing or contrary to the exemption therein.

Whereas, Due notice and advertisement has been given and made of the intention to apply for this act pursuant to article 48 of the constitution of this State; and

Whereas, The New Orleans Waterworks Company is being subjected to municipal taxation notwithstanding the exemption from taxation granted by its charter in consideration of water to be supplied to the city of New Orleans; and

Whereas, It is possible and desirable to furnish the inhabitants of New Orleans with clear or filtered water from the Mississippi river; therefore,

Section 1. *Be it enacted by the General Assembly of the State of Louisiana*, That in all instances of the taxation of the franchises or property of the New Orleans Waterworks Company for any year or years by or for the city of New Orleans, or for municipal purposes, whether such taxation be for past or future years, and the said company be in any manner obliged to pay, notwithstanding the exemption granted in section 11 of act No. 33 of acts of 1877, E. S., then, in all such instances, the said city of New Orleans is hereby empowered and required to pay the said company the value of all the water the said company has supplied or shall supply during any year or years, for which said taxes have been or shall be levied, to or for the use and purposes of the city of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires or other public purposes.

Sec. 2. *Be it further enacted, etc.*, That in all instances of such taxation, contrary to said exemption, or any future year or years, the city of New Orleans shall provide in its budget, or shall set apart and appropriate a sum sufficient to pay for the

said water supply for said year or years; and unless this be observed and done the said company shall not be compelled to deliver water for the uses and purposes aforesaid.

Sec. 3. *Be it further enacted, etc.*, That any taxes already imposed for any year contrary to said exemptions shall not be exacted, nor any penalty or interest accrued be demanded thereon, or any begin to run, until said city shall have provided for the payment of the water supplied in said year, or provision made therefor by remedy at law or equity.

Sec. 4. *Be it further enacted, etc.*, That to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water the city of New Orleans be and is hereby empowered to contract with the said company, and determine upon terms and conditions, and fix a price for obtaining from said company such supply of clear or filtered water.

Sec. 5. *Be it further enacted, etc.*, That nothing in this act shall be construed as in any manner abridging or otherwise affecting any of the rights, franchises and privileges heretofore granted to said company; but all such rights, franchises and privileges shall continue and belong to said company.

Sec. 6. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent herewith be and are hereby repealed, and this act shall have effect from and after its promulgation.

Approved, 7th July, 1884.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCH,
Lieutenant-Governor and President of the Senate.
S. D. MCENERY,
Governor of the State of Louisiana.

A true copy from the original:
OSCAR ARROYO,
Secretary of State.

APPENDIX B.

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans.

Be it known, that on this third day of the month of October, in the year of our Lord one thousand eight hundred and eighty-four and of the independence of the United States of America the one hundred and ninth.

Before me, Joseph Dewey Taylor, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and

qualified, and official notary of the city of New Orleans, and in the presence of the witnesses hereinafter named and undersigned—

Personally came and appeared the Honorable Joseph Valsin Guillotte, mayor of the city of New Orleans, herein acting in his official capacity as mayor aforesaid, being herein and hereunto specially authorized and empowered by ordinance number 909, council series, adopted by the council of the city of New Orleans on the 23d day of September, A. D. 1884, a duly certified copy of which ordinance is hereto annexed and made part hereof.

Also came and appeared Mr. Albert Baldwin, president of and herein representing the New Orleans Waterworks Company, being herein and hereunto specially authorized and empowered by a resolution of the board of directors of said waterworks company passed at a meeting of said board held in the city of New Orleans on the 27th day of September, A. D. 1884, a certified copy of which resolution is hereto annexed and made part hereof.

Whereupon said Albert Baldwin, in his said capacity as president, declared and does hereby declare that he accepts, all and singular the terms, conditions, provisions, obligations, rights, benefits and advantages set forth and contained in said ordinance No. 909, adopted by the council of the city of New Orleans, on the 23d day of September, A. D. 1884, and approved by mayor on the 26th day of September, A. D. 1884, thereupon duly promulgated, and which said ordinance, so accepted by said Baldwin, president, in the words and figures following, to-wit:

An ordinance to carry out act No. 56 of the acts of 1884, providing for a future water supply from the New Orleans Waterworks Company, to and for the city of New Orleans and certain institutions, and regulating the use of water and the payment therefor.

Whereas, the city of New Orleans has been, and is and will be unable to allow the New Orleans Waterworks Company the fifty years' exemption from taxation, being the consideration for a free supply of water, contemplated by section 11 of act No. 33 of the acts of 1877; and the courts having decided that the exemption from municipal taxation granted in said act is not, and shall not be enjoyed, and therefore, as is also decided, that the city must pay for the water supplied by said company; and

Whereas, it is best to arrange for a fixed annual price for said water supply, rather than leave the city liable to an annual demand, the amount of which cannot be known in advance, and from which the city cannot be relieved, but is specially authorized and required to provide for the payment therefor; and

Whereas, the said New Orleans Waterworks Company is willing to accept terms, arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to the number of fire hydrants, fire plugs or fire wells,

now numbering eleven hundred and thirty-nine (1139), in this city; therefore,

Section 1. Be it ordained by the city council of the city of New Orleans, that during the term of the charter of the New Orleans Waterworks Company, beginning with the year 1885, the supply of water for which this ordinance provides shall be furnished by the said company from the pipes and plugs of said company, now laid or hereafter to be laid, for the following purposes, to wit: For the extinguishment of fires and the cleansing of the gutters; for the use of all existing public buildings, public markets, public squares and places, public schools and the public charitable institutions supported and to be established and supported by the State or city, and now supplied by the said company; it shall be the duty of said company to keep and maintain a head or pressure of water of not less than fifty feet head, between the hours of 7 a. m. and 6 p. m.; and the reservoir supply at night and between the hours shall be of such abundance as amply to cover the needs of the fire department for extinguishing fires; and said company shall make such provision as may be necessary to reinforce or supplement said reservoir supply in case of need or accident. In consideration for said supply the city of New Orleans shall pay, during the term of said company's charter, to the said New Orleans Waterworks Company sixty ($60) dollars per annum for each and every fire plug, fire hydrant and fire well connected with the mains or pipes of said company, of which said fire plugs, fire hydrants and fire wells there are now eleven hundred and thirty-nine (1139), which number shall be the least number of the annual sum to be paid to said company, and for every additional hydrant, fire plug or fire well exceeding said number, hereafter attached to said pipes or mains, the city shall pay an additional sixty ($60) dollars per annum.

Sec. 2. Be it further ordained, etc., That the city of New Orleans shall have the power in time of drouth to furnish water to such persons as may live outside the lines (of) the pipes of said waterworks company free from all charges by the same, and shall have further power by ordinance duly passed and notified in writing to said company, before each annual appropriation for said supply, to decrease or increase the number of fire plugs, fire hydrants and fire wells for the ensuing year, all such ordinances to designate the locations for the new attachments or intended cut offs; provided, however, that the number of said fire hydrants, fire plugs and fire wells be not reduced below eleven hundred and thirty-nine (1139), the intent thereof being that the annual price to be paid for said water supply shall never be less than as fixed herein, by reference to the now existing number of said fire plugs, fire hydrants and fire wells; but the city expressly reserves the power to change the location of any and all of said fire plugs, hydrants or wells whenever the council

shall deem it necessary, said changes to be at the cost of the company.

Sec. 3. Be it further ordained, etc., that the city of New Orleans shall annually set apart, appropriate and provide in its annual budgets of expenditures and receipts, beginning with those for the year 1885, and in all successive budgets for each year successively, a sum sufficient to pay for said annual water supply, as fixed in the foregoing sections of this ordinance; and that said annual sum or price shall be paid to said New Orleans Waterworks Company, in twelve equal and monthly installments, one on the last day of each consecutive month, beginning in the month of January, 1885, for the year 1885; and beginning also in the month of January in each year thereafter, and in event of prompt cash payments of said installments during each year the city of New Orleans shall be entitled to deduct and retain from the last installment in each year six per centum of the entire amount paid and payable to the said company in and for said year; but should any installment be unpaid when due it shall bear interest at the rate of eight per centum per annum from the end of the month in which it was payable until finally paid.

Sec. 4. Be it further ordained, etc., That it is hereby made the duty of the comptroller or auditing officer, and of the treasurer of said city of New Orleans, carefully to set apart and keep, as a distinct fund, the moneys or collections which shall have been appropriated in each year, pursuant to this ordinance, and such proportion of all collections of the revenue as shall have been appropriated in the budgets to and for said company or the said water supply for each year shall be carefully and exactly set apart by said officers as collected, and shall be warranted for by said comptroller and paid by said treasurer to said company, during each month, without further direction, ordinance or authority than that hereby given.

Sec. 5. Be it further ordained, etc., That the New Orleans Waterworks Company shall have the right to inspect and to examine into the use of water to be supplied under this ordinance, and the city of New Orleans and its officers shall see that no water is taken or used except for the purpose aforesaid, and that there shall be no waste nor more water taken and used than may be actually necessary for the purposes aforesaid; and to this end the city of New Orleans shall adopt all proper measures or ordinances to prevent waste and to prevent any use of water except for the purposes herein designated; and it is hereby made the duty of the officers of said city, and of those of any and all public buildings and public institutions, and of all persons using water under this ordinance, to prevent waste and to prevent the use of such water except for the actual need for the purposes aforesaid.

Sec. 6. Be it further ordained, etc., That the mayor be and

is hereby authorized and directed to execute a contract by notarial act, to and with said company, embodying and carrying out the provisions of this ordinance.

Sec. 7. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent or in conflict with this ordinance be and the same are hereby repealed.

Adopted by the council of the city of New Orleans, September 23d, 1884.

M. McNAMARA,
Clerk of Council.

Approved September 26, 1884.

J. V. GUILLOTTE, *Mayor.*

A true copy:

TH. BUISSON,
Secretary to the Mayor.

And said Joseph Valsin Guillotte, mayor, and said Albert Baldwin, president, having each read and declared himself fully cognizant of the contents of said ordinance, do severally declare that they do hereby contract, engage and agree, one with the other, according to the terms, provisions, conditions and language of said ordinance, all and singular of which said terms, conditions, provisions and language shall be and is hereby made a contract engagement and agreement between said parties, the city of New Orleans and the New Orleans Waterworks Company, to be observed and carried out and held and maintained inviolate during the entire term and existence of the said New Orleans Waterworks Company, its assigns or successors as now fixed in the charter of said company, being a period of fifty years from the incorporation of said company.

The said Albert Baldwin, as president aforesaid, engages to furnish and supply water from the pipes of said company in the manner, at the times and for all purposes and objects as set forth in and pursuant to the provisions and requirements of the said ordinance No. 909, council series; to furnish or supply water to and for the public places, buildings and institutions, as in and by said ordinance required; to allow the city of New Orleans in time of drouth, said state or condition of drouth to be decided by the board of this company and the city council, to furnish water to such persons as may live outside the lines of the pipes of the said company for the needs of said persons, without waste and by such means of transportation by carts, wagons, barrels or like appliances as said city may provide and furnish, all pursuant to the intent and purposes of sections second and fifth of said ordinance; to observe and obey any ordinance duly notified to said company directing the increase of the number of fire plugs, fire hydrants and fire wells or the decrease thereof, provided said decrease be and not below eleven hundred and thirty-nine (1139) in number,

all according to section third of said ordinance; and further, he engages and contracts, as president aforesaid, to do, perform and give and to observe, carry out and fulfil all things required of said company by or in said ordinance.

In consideration whereof, said Joseph Valsin Guillotte, mayor aforesaid, engages and contracts to pay unto said company, annually, the sum of *sixty ($60) dollars* for each and every fire plug, fire hydrant and fire well connected with the mains or pipes of said company, of which there are now *eleven hundred and thirty-nine (1139)*, and which number shall ever be the least measure of the annual sum to be paid said company; to pay said company annually *sixty ($60) dollars* for every additional hydrant, fire well or plug, exceeding said number of eleven hundred and thirty-nine (1139), and hereafter attached to said mains or pipes; to notify said company in writing of all decrease or increase required of said hydrants or wells; to make promptly, fully and specially, the annual appropriations and monthly payments as required by and in section three of said ordinance, the city to deduct or retain from the last monthly payment in each year six per centum of each annual sum paid and to be paid said company as provided in said section three; to hold and set apart and keep as a distinct fund the moneys or collections as required by said ordinance, and upon request or demand of said company on the last day of each month in any year, the comptroller of the city shall warrant on the treasurer for and the treasurer shall pay from said moneys or collections, the installments which at that time shall be due, without other authority or ordinance than said ordinance; and the comptroller or auditing officer and the treasurer of the city shall faithfully carry out and promptly obey all the requirements and provisions of the fourth section of said ordinance, and shall raise no obstacle nor impose any delay in obeying the same; and it shall be the duty of each, in his respective department, to keep all money and collections appropriated under said ordinance and this contract, as separate from all other moneys, and as a distinct fund; all pursuant to and in accordance with said section four.

The said company shall have the right to inspect and to examine into and concerning the use of water supplied by it, and none of said water shall be wasted or used otherwise than for the purposes named in said ordinance and to the extent of the actual need for said purposes, all as provided in section five of said ordinance; and to this end the officers and persons designated in said section five and the city of New Orleans shall do, perform and abstain from doing the things set forth in said section five of said ordinance.

Further, it is agreed, understood and stated by and between the said parties, that the specification or detailing in this instrument of the several rights, duties, obligations and things to be done, performed, observed, carried out or abstained from respect-

ively, does not and shall not limit, modify or in any manner take from the effect of any of the terms, conditions, provisions or expressions of said ordinance, all of which are, by these presents, accepted and made binding, effective and operative upon and between the said New Orleans Waterworks Company and the city of New Orleans, their assigns or successors, for and during the term named in the charter of said company.

Thus done and passed in my office in the city of New Orleans aforesaid, the day, month and year aforesaid, in the presence of Charles G. Rebentisch and George R Goetz, witnesses of lawful age, residing in this parish, who have signed their names with said parties and me, notary, after due reading of the whole.

Original signed:

J. V. GUILLOTTE, *Mayor.*
ALBERT BALDWIN,
President N. O. Waterworks Co.
C. G. REBENTISCH.
GEO. B. GOETZ.
J. D. TAYLOR, *Notary Public.*

A true copy of the original:

NEW ORLEANS, October 14, 1886.

J. D. TAYLOR, *Notary Public.*